

# Judging without the Facts: A Schematic for Reviewing State Secrets Privilege Claims

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## NOTE

# JUDGING WITHOUT THE FACTS: A SCHEMATIC FOR REVIEWING STATE SECRETS PRIVILEGE CLAIMS

*Michael H. Page*<sup>†</sup>

INTRODUCTION .....	1244
I. A BRIEF HISTORY .....	1247
A. <i>Pre-Reynolds</i> .....	1247
B. <i>Reynolds</i> .....	1249
C. <i>Post-Reynolds</i> .....	1250
D. Trends .....	1253
II. THE CONFUSED <i>Reynolds</i> Analysis .....	1254
A. The Analysis .....	1255
B. The Problems .....	1256
1. <i>Reynolds's Trigger Test</i> .....	1257
2. <i>Where the Trigger Test and Deference Overlap: The</i> <i>Requesting Party's Interest</i> .....	1261
3. <i>Deference: How Much</i> .....	1264
4. <i>Deference: Why</i> .....	1266
a. <i>Risk of Exposure</i> .....	1266
b. <i>Institutional Competency</i> .....	1267
c. <i>Separation of Powers</i> .....	1269
d. <i>Potential Conflict of Interest</i> .....	1272
III. A PROPOSED ANALYSIS .....	1275
A. The Trigger Test .....	1276
1. <i>The Public's Interest</i> .....	1276
2. <i>The Requesting Party's Interest</i> .....	1277
B. Judicial Review: The Deference Calculus .....	1278
1. <i>Information Asymmetry Error</i> .....	1279
2. <i>Margin of Competence Deference and Potential</i> <i>Conflict of Interest</i> .....	1280
3. <i>Margin of Scrutiny Deference</i> .....	1281

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4. <i>Application</i> .....	1282
CONCLUSION .....	1283

## INTRODUCTION

The extent to which a judge should defer to an executive official's claim of state secrets privilege is one of the law's "open areas,"<sup>1</sup> meaning neither text nor precedent fully dictates the judge's course of action.<sup>2</sup> The problem of the open area is particularly significant where national security and civil liberties intersect.<sup>3</sup> In such cases, judges act on presumptions, such as the presumption of judicial deference on matters of national security.<sup>4</sup>

The rationale for deferring to executive claims of state secrets privilege is itself based on two presumptions. The first presumption is that the executive branch is in a better position than the judiciary to assess national security-related risks to public safety.<sup>5</sup> The second presumption is that when the executive branch invokes the privilege, it does so *solely* with the public's interest in mind.<sup>6</sup> If, however, either of these presumptions turns out to be incorrect, or less correct than the judge had presumed, the deference that the judge had granted would be without a rational basis.

Consider the following three situations. In *Situation A*, you are at a flea market and are interested in purchasing an antique bookcase. Other than your knowledge that such bookcases are fashionable, you know nothing about them. The owner of the flea market is an expert antique dealer. Each vendor pays the owner a flat fee; payment is not dependent on what the vendor eventually sells. The owner has personally priced every item worth over \$100 to ensure that the flea market maintains its good reputation. You see a bookcase priced at \$750.

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<sup>1</sup> Judge Richard A. Posner coined the concept of a legal "open area" in *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. Rev. 1049, 1054 (2006).

<sup>2</sup> The Supreme Court has, of course, provided judges with some guidance. That guidance, however, is one fifty-five-year-old opinion with little coherence and only a shaky foundation in American jurisprudence. See William G. Weaver & Danielle Escontrias, *Origins of the State Secrets Privilege*, 43, 46–47, 58, 65–66 (2008) available at <http://ssrn.com/abstract=1079364> (arguing that history provides little support for great judicial deference in state secrets privilege cases). As Weaver summarized: "It is difficult to conclude other than that courts have simply abandoned the field of a contentious area of law . . ." *Id.* at 65–66.

<sup>3</sup> See Geoffrey R. Stone, *Civil Liberties v. National Security in the Law's Open Areas*, 86 B.U. L. Rev. 1315, 1315 (2006).

<sup>4</sup> See *id.* at 1316.

<sup>5</sup> See *id.* ("[I]ndividual judges have relatively little first-hand experience" with cases implicating national security matters because these cases "arise infrequently." Furthermore, "judges are relative novices when it comes to assessing the possible implications of their decisions for national security.").

<sup>6</sup> See *id.* at 1327–28 (finding it necessary that "those making the critical judgments are properly taking the relevant factors into account in a fair and reasonable manner").

In *Situation B*, assume the same facts as in *Situation A*, except that in *Situation B*, the owner of the flea market is not an *expert* antique dealer. *Situation C* is identical to *Situation B* except that in *Situation C*, the owner makes a significant commission on each item sold.

Does your confidence in the accuracy of the bookcase's price vary from *Situation A* to *Situation C*? If so, why? In *Situation A*, you might defer to the owner's expert judgment. In *Situation B*, although the owner is no more of an expert than you are, you might believe that another's honest evaluation of the bookcase's value is worthy of some respect. In *Situation C*, however, the owner not only lacks expertise but also has an ulterior motive. Might the prospect of making a commission on the bookcase have influenced the owner's evaluation of the bookcase's value?

Although one's consumer instincts take these differences into account, the state secrets privilege does not. The state secrets privilege, which traces its modern origins to the 1953 case of *United States v. Reynolds*,<sup>7</sup> permits the head of an executive department to withhold from a court information that would jeopardize national security if disclosed.<sup>8</sup> The government's use of the privilege in several recent, high-profile, and controversial cases<sup>9</sup> has renewed scholarly and public attention to the privilege. On October 9, 2007, the U.S. Supreme Court denied Khaled el-Masri's petition for writ of certiorari.<sup>10</sup> El-Masri alleges that the CIA oversaw his confinement and torture in an Afghan prison.<sup>11</sup> After el-Masri brought suit in the Eastern District of Virginia, the government interceded, asserted the state secrets privilege, and successfully had the case dismissed.<sup>12</sup> The Fourth Circuit affirmed the district court's dismissal.<sup>13</sup> In el-Masri's case, although the government's expertise arguably places it in a position similar to

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<sup>7</sup> 345 U.S. 1 (1953).

<sup>8</sup> See *id.* at 10. For examples of what constitutes an undermining of national security, see *infra* notes 127–29.

<sup>9</sup> See, e.g., *el-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007) (holding that the state secrets privilege barred plaintiffs' discovery requests in an extraordinary rendition case); *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007) (exploring the state secrets privilege in the warrantless wiretapping context); *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (holding that the state secrets privilege forecloses a remedy in an extraordinary rendition context); *ACLU v. NSA*, 467 F.3d 590 (6th Cir. 2006) (granting government's motion for stay pending appeal from district court decision enjoining government from using the Terrorist Surveillance Program); *Terkel v. AT&T Corp.*, 441 F. Supp. 2d 899 (N.D. Ill. 2006) (holding that the state secrets privilege barred plaintiffs' discovery of whether AT&T provided records to NSA); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006) (exploring the state secrets privilege in the warrantless surveillance context).

<sup>10</sup> 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007).

<sup>11</sup> See *el-Masri*, 479 F.3d at 300.

<sup>12</sup> *Id.* at 299, 301–02.

<sup>13</sup> *Id.* at 313.

the flea market owner in *Situation A*, to some observers,<sup>14</sup> its interest in avoiding accountability for its extraordinary rendition policy places it in the conflicted position of the owner in *Situation C*.

Commentators have nearly universally criticized the state secrets privilege,<sup>15</sup> suggesting a range of alternatives, including abolishing the privilege altogether;<sup>16</sup> making it a qualified rather than absolute privilege;<sup>17</sup> using special masters<sup>18</sup> or special tribunals to adjudicate cases involving sensitive information;<sup>19</sup> and enlisting Congress to legislate an alternative.<sup>20</sup> Many commentators have criticized the courts for being overly deferential to the government's claims of privilege.<sup>21</sup>

This Note does not directly engage these arguments. Rather, it assumes that the state secrets privilege is desirable and addresses the conditions under which the privilege should apply (the trigger test), as well as, in relative terms only, the extent to which a judge should review privilege claims (margin of scrutiny deference). The trigger test draws from the "reasonable danger" language in *Reynolds*<sup>22</sup> and is a function of three variables: (1) the magnitude of harm to the public; (2) the likelihood that disclosing the information at issue will result in that harm; and (3) the importance of the information to the case of the party requesting it. The margin of scrutiny deference then guides the extent to which a judge should trust, with limited information, the

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<sup>14</sup> See, e.g., Editorial, *Supreme Disgrace*, N.Y. TIMES, Oct. 11, 2007, at A30 (commenting that the district court "dismissed [el-Masri's] civil suit in a reflexive bow to a flimsy government claim").

<sup>15</sup> See, e.g., RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 216–24 (1974); Frank Askin, *Secret Justice and the Adversary System*, 18 HASTINGS CONST. L.Q. 745, 760–61 (1991); Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 156 (2006); William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 POL. SCI. Q. 85, 107–12 (2005); J. Steven Gardner, Comment, *The State Secret Privilege Invoked in Civil Litigation: A Proposal for Statutory Relief*, 29 WAKE FOREST L. REV. 567, 586–87, 589–91 (1994); Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L.J. 570, 586–88 (1982). See generally Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 FORDHAM L. REV. 1931 (2007) (discussing the history of the privilege, recent case law implicating the privilege, and offering a general criticism of the privilege).

<sup>16</sup> See Christopher Brancart, *Rethinking the State Secrets Privilege*, 9 WHITTIER L. REV. 1, 14–15 (1987).

<sup>17</sup> See LOUIS FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *Reynolds* Case 257 (2006); Veronica M. Fallon, Note, *Keeping Secrets From the Jury: New Options for Safeguarding State Secrets*, 47 FORDHAM L. REV. 94, 107–09 (1978); Barry A. Stulberg, Comment, *State Secrets Privilege: The Executive Caprice Runs Rampant*, 9 LOY. L.A. INT'L & COMP. L. REV. 445, 478–79 (1986); Note, *supra* note 15, at 583–86.

<sup>18</sup> See Brancart, *supra* note 15, at 24–25; Fallon, *supra* note 17, at 110–11; Note, *supra* note 15, at 588.

<sup>19</sup> See James Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875, 897–98 (1966).

<sup>20</sup> See Gardner, *supra* note 15, at 598–609 (proposing statutory schemes based on compensating individuals).

<sup>21</sup> See, e.g., FISHER, *supra* note 17, at 258; Fuchs, *supra* note 15, at 163–75; Christina E. Wells, *Questioning Deference*, 69 MO. L. REV. 903, 906–09, 939–48 (2004).

<sup>22</sup> *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

executive official's claim that the circumstances of the case satisfy the trigger test. The margin of scrutiny deference is also a function of three variables: (1) the degree to which the executive official is more qualified than the reviewing judge to accurately assess the variables in the trigger test; (2) the likelihood that factors irrelevant to public safety influenced the executive official's judgment; and (3) the amount of relevant information that the executive official considered but withheld from the reviewing judge. The result is a schematic that will help guide judges to identify those cases in which deference is more or less appropriate and yet is flexible enough to accommodate a wide range of views regarding how much deference is appropriate in absolute terms.

Part I briefly recounts the history of the state secrets privilege. Part II explores the modern framework for evaluating state secrets privilege claims, identifying where ambiguities and inconsistencies have rendered the analysis incoherent. Part III offers an analytical framework, derived from *Reynolds*, that accounts for the ambiguities and inconsistencies identified in Part II.

## I

### A BRIEF HISTORY<sup>23</sup>

#### A. Pre-*Reynolds*

The origins of the state secrets privilege are "obscure and confused."<sup>24</sup> Two lines of cases intersected in 1953 to form the modern doctrine, one from each side of the Atlantic.<sup>25</sup> In the United States, many courts and commentators trace the privilege's origin to the trial of Aaron Burr.<sup>26</sup> On trial for treason, Burr sought access to a letter

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<sup>23</sup> For a thorough treatment of the privilege's history, see generally Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249, 1270–1300 (2007); Weaver & Escontrias, *supra* note 2; Weaver & Pallitto, *supra* note 15, at 92–101.

<sup>24</sup> Weaver & Pallitto, *supra* note 15, at 93; see also Chesney, *supra* note 23, at 1270 (noting that the privilege's "nature and scope remain the subject of considerable uncertainty"); Weaver & Escontrias, *supra* note 2, at 65, 68 (finding the origins of the doctrine "not parts of a coherent whole" and *Reynolds* as "devoid of policy, theory, or principles").

<sup>25</sup> Whether the privilege actually has any pre-*Reynolds* roots in the United States is a point of contention. Compare *Jabara v. Kelley*, 75 F.R.D. 475, 483 (E.D. Mich. 1977) (claiming that the privilege "can be traced as far back as Aaron Burr's trial in 1807"), with Weaver & Escontrias, *supra* note 2, at 43 ("There is nothing in the way of state secrets jurisprudence prior to the *Reynolds* decisions despite persistent claims to the contrary.").

<sup>26</sup> See FISHER, *supra* note 17, at 212–13 (collecting judicial remarks identifying Burr's trial as the privilege's origin). But see Weaver & Escontrias, *supra* note 2, at 47–52. William Weaver and Danielle Escontrias have insisted that "the privilege sprang upon the Republic fully mature in the *Reynolds* case, which relied heavily on English precedent." *Id.* at 12. (exploring the privilege's origin in English and Scottish law and dismissing *Burr* as precedent).

that General Wilkinson had sent to President Jefferson that purportedly confirmed Burr's guilt.<sup>27</sup> The prosecution insisted that it was

improper to call upon the president to produce the letter of Gen. Wilkinson, because it was a private letter, and probably contained confidential communications, which the president ought not and could not be compelled to disclose. *It might contain state secrets, which could not be divulged without endangering the national safety.*<sup>28</sup>

Chief Justice Marshall,<sup>29</sup> rejecting the prosecution's argument, admitted that "there may be matter, the production of which the court would not require."<sup>30</sup> Elaborating, he stated: "There is certainly nothing before the court which shows that the letter in question contains any matter the disclosure of which would endanger the public safety."<sup>31</sup>

In the 1875 case of *Totten v. United States*, the estate of an alleged spy sued the government to enforce a contract for espionage services that the estate claimed the deceased spy had entered into with the President.<sup>32</sup> Justice Field, writing for the Supreme Court, chastised the lower courts for even considering the merits of the case.<sup>33</sup> He concluded:

It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.<sup>34</sup>

*Totten's* relationship to the modern state secrets privilege is unclear. In the 2005 case of *Tenet v. Doe*, the Supreme Court explicitly distinguished the *Totten* doctrine from the *Reynolds* doctrine.<sup>35</sup> William Weaver and Robert Pallitto argue that both *Burr* and *Totten* are "more properly considered executive privilege" cases, the reasoning of which is grounded in the separation of powers doctrine.<sup>36</sup> The dis-

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<sup>27</sup> *United States v. Burr*, 25 F. Cas. 30, 30 (Marshall, Circuit Justice, D. Va. 1807).

<sup>28</sup> *Id.* at 31 (emphasis added). Compare the language from *Burr* with that of the Court in *United States v. Reynolds*: "It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, *in the interest of national security, should not be divulged.*" 345 U.S. 1, 10 (1953) (emphasis added).

<sup>29</sup> Chief Justice Marshall was riding circuit.

<sup>30</sup> *Burr*, 25 F. Cas. at 37.

<sup>31</sup> *Id.*

<sup>32</sup> See *Totten v. United States*, 92 U.S. 105, 106-07 (1875).

<sup>33</sup> See *id.*

<sup>34</sup> *Id.* at 107.

<sup>35</sup> See *Tenet v. Doe*, 544 U.S. 1, 8-10 (2005).

<sup>36</sup> See Weaver & Pallitto, *supra* note 15, at 93.

inction between the state secrets privilege and executive privilege, however, is a recent one.<sup>37</sup>

Developments on the other side of the Atlantic may have had a more significant influence on the modern state secrets privilege. The 1860 case of *Beatson v. Skene* concerned slanderous comments Skene had allegedly made against Beatson, the commander of a cavalry unit in the Crimean War.<sup>38</sup> During the trial, the court subpoenaed the Secretary of State for War to produce certain letters that Beatson had written to Skene.<sup>39</sup> The Secretary objected "on the ground that his doing so would be injurious to the public service."<sup>40</sup> The judge agreed: "We are of opinion that, if the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a Court of justice . . . ."<sup>41</sup> Whether the information posed such a threat, the court continued, "must be determined, not by the Judge but by the head of the department having the custody of the paper."<sup>42</sup> Over eighty years later, in *Duncan v. Cammell, Laird & Co.*, the House of Lords affirmed *Beatson's* approach, stating that "the approved practice . . . is to treat a ministerial objection taken in proper form as conclusive."<sup>43</sup>

#### B. *Reynolds*

On October 6, 1948, six years after *Duncan*, an Air Force B-29 bomber crashed in Waycross, Georgia.<sup>44</sup> Nine people died, including three civilian engineers.<sup>45</sup> The widows of the deceased engineers each sued under the Federal Tort Claims Act seeking damages for wrongful death.<sup>46</sup> During discovery, one of the plaintiffs requested a copy of the crash report.<sup>47</sup> The government refused to disclose it,

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<sup>37</sup> See Chesney, *supra* note 23, at 1276-77 (noting that the first American evidence treatise, published in 1842, did not distinguish between cases in which the government withheld information under a deliberative-process rationale from those in which it withheld information under a security rationale). Even after *Reynolds*, courts struggled to distinguish the qualified executive privilege from the absolute state secrets privilege. See *United States v. Nixon*, 418 U.S. 683, 706-10 (1974) (permanently separating the two privilege doctrines); *United States v. Ahmad*, 499 F.2d 851, 855 (3d Cir. 1974).

<sup>38</sup> (1860) 157 Eng. Rep. 1415, 1420 (Exch. Div.).

<sup>39</sup> *Id.* at 1421.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See *Duncan v. Cammell, Laird & Co.* [1942] A.C. 624, 641 (H.L.). This part of *Duncan* was overruled in *Conway v. Rimmer*, [1968] A.C. 910, 911 (H.L.).

<sup>44</sup> See *Reynolds v. United States*, 192 F.2d 987, 989 (3d Cir. 1951), *rev'd*, 345 U.S. 1 (1953).

<sup>45</sup> See *id.*

<sup>46</sup> See *id.*

<sup>47</sup> See *id.*



claiming that disclosure would “seriously hamper[ ] national security, flying safety, and the development of highly technical and secret military equipment.”<sup>48</sup> In response, the district court ordered the report’s disclosure for *in camera* review.<sup>49</sup> The government appealed.

The Third Circuit also rejected the government’s privilege claim.<sup>50</sup> In doing so, it made two important contributions to the state secrets privilege.<sup>51</sup> First, it noted that “[s]tate secrets of a diplomatic or military nature have always been privileged from disclosure in any proceeding.”<sup>52</sup> Second, it stated that the court, not the government, is the privilege’s gatekeeper, distinguishing *Duncan* by noting that “whatever may be true in Great Britain the Government of the United States is one of checks and balances.”<sup>53</sup>

On March 9, 1953, the Supreme Court reversed, holding that the government need not disclose the crash report.<sup>54</sup> The Court adopted *Duncan*’s framework “nearly *in toto*,”<sup>55</sup> following the Third Circuit only in its conclusion that the judiciary, not the executive, ultimately determines whether the privilege applies.<sup>56</sup> Despite acknowledging its gatekeeping function, the Court made its determination that the privilege applied without even examining the crash report.<sup>57</sup> Lower court improvisations and divisions aside, *Reynolds* continues to be the modern framework for analyzing state secrets privilege claims.<sup>58</sup>

### C. Post-*Reynolds*

In *Reynolds*, the government invoked the privilege to prevent the disclosure of a crash report that might have contained information about secret military missions. Does *Reynolds* apply, however, when the government is the defendant, accused of constitutional violations? In the 1967 case of *Elson v. Bowen*, the Supreme Court of Nevada appears to have answered that question in the negative.<sup>59</sup> *Elson* was a

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<sup>48</sup> See *id.* at 990.

<sup>49</sup> See *id.* at 990–91; Chesney, *supra* note 23, at 1284.

<sup>50</sup> See *Reynolds*, 192 F.2d at 998.

<sup>51</sup> See Chesney, *supra* note 23, at 1284–85.

<sup>52</sup> *Reynolds*, 192 F.2d at 996.

<sup>53</sup> *Id.* at 997.

<sup>54</sup> See *United States v. Reynolds*, 345 U.S. 1, 11–12 (1953).

<sup>55</sup> Weaver & Pallitto, *supra* note 15, at 98 (criticizing *Reynolds*’s reliance on *Duncan*).

<sup>56</sup> See *Reynolds*, 345 U.S. at 8.

<sup>57</sup> See *id.* at 11. The crash report’s actual contents, discovered in 2000 through a Freedom of Information Act request, did not include any sensitive information. See FISHER, *supra* note 17, at 165, 176–77. For a thorough discussion of *Reynolds*, the crash report, and subsequent litigation, see generally FISHER, *supra* note 17.

<sup>58</sup> See *infra* Part II.A.

<sup>59</sup> 436 P.2d 12, 15 (Nev. 1967) (“Of the numerous authorities relating to the question of discovery from governmental agents and agencies none directly involve the seeking of information from the agents who are parties in the litigation and whose alleged illegal activities are the subject of the lawsuit.”). Although at least one influential commentator

consolidation of lawsuits arising from the FBI's alleged wiretapping of Las Vegas hotels.<sup>60</sup> Among the defendants were five FBI agents accused of performing the "actual 'bugging.'"<sup>61</sup> The plaintiffs hoped to learn from Elson, one of the agents, the "identities, methods, locations, and other relevant information" concerning the surveillance operation.<sup>62</sup> The Attorney General instructed Elson not to disclose the requested information because it would "reveal F.B.I. tactical secrets."<sup>63</sup> The court rejected the claim of privilege on two grounds. First, the requested information was no longer a secret.<sup>64</sup> And second, after discussing *Reynolds*, the court stated: "Government cannot break the law to enforce the law, . . . and it follows that government should not be allowed to use the claim[ ] of executive privilege . . . as a shield of immunity for the unlawful conduct of its representatives."<sup>65</sup>

The *Elson* court's conception of the relationship between *Reynolds*, executive privilege, the state secrets privilege, and claims of national security is not entirely consistent with today's understanding. Although it is unclear whether the *Elson* court ultimately based its holding on the state secrets privilege or executive privilege, it seemed to conclude that when government officials are accused of violating an individual's Fourth Amendment right to privacy through warrantless surveillance, the government cannot escape liability by invoking an evidentiary privilege.<sup>66</sup> The *Elson* approach received indirect support in one federal district court decision,<sup>67</sup> but the government's successful invocation of the privilege in a spate of warrantless surveillance cases in the late 1970s and 1980s put to rest any lingering doubt as to whether the government could use the privilege when accused of breaking the law.<sup>68</sup>

A couple of off-hand remarks in the non-state secrets privilege case of *United States v. Nixon* contributed significantly to the privilege's

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has read *Elson* as answering that question in the negative by rendering "the privilege . . . categorically inapplicable when the government stands accused of unconstitutional conduct," Chesney *supra*, note 23, at 1291, *Elson* could also be read as simply reducing judicial deference to executive assertions of privilege under the case's circumstances. The latter reading better comports with this Note's proposed analysis.

<sup>60</sup> See *Elson*, 436 P.2d at 13.

<sup>61</sup> See *id.*

<sup>62</sup> See *id.* at 15.

<sup>63</sup> See *id.* at 16.

<sup>64</sup> See *id.* at 15–16.

<sup>65</sup> *Id.* at 16 (citations omitted).

<sup>66</sup> See *id.*

<sup>67</sup> See *Black v. Sheraton Corp.*, 371 F. Supp. 97, 101–02 (D.D.C. 1974), *vacated*, 564 F.2d 531 (1977) ("Any evidence which concerns the government's illegal acts are not privileged.").

<sup>68</sup> See, e.g., *Halkin v. Helms (Halkin I)*, 598 F.2d 1 (D.C. Cir. 1978); *ACLU v. Brown*, 619 F.2d 1170 (7th Cir. 1980) (en banc); *Jabara v. Kelley*, 75 F.R.D. 475 (E.D. Mich. 1977); *Kinoy v. Mitchell*, 67 F.R.D. 1 (S.D.N.Y. 1975).

modern identity. First, the *Nixon* court distinguished the state secrets privilege from the better-known executive privilege.<sup>69</sup> In doing so, it noted that although the executive privilege is qualified, the state secrets privilege is absolute.<sup>70</sup> Then, the Court associated the privilege (albeit obliquely) with Article II and the separation of powers.<sup>71</sup> And finally, it stated that the privilege may be within the category of executive decisions entitled to "utmost deference."<sup>72</sup>

The post-*Nixon* state secrets privilege first arose in full form in a D.C. Circuit decision, *Halkin v. Helms* (*Halkin I*).<sup>73</sup> In *Halkin I*, twenty-seven former Vietnam War protesters sued former and present officials in the National Security Agency, Central Intelligence Agency, Defense Intelligence Agency, Federal Bureau of Investigation, and Secret Service, alleging constitutional and statutory violations arising out of warrantless surveillance.<sup>74</sup> The Secretary of Defense invoked the privilege, claiming that disclosing whether the alleged surveillance took place "would reveal important military and state secrets respecting the capabilities of the NSA for the collection and analysis of foreign intelligence."<sup>75</sup>

The D.C. Circuit's *Halkin I* analysis has guided other courts' approaches to the state secrets privilege. First, the *Halkin I* court found it irrelevant that the very information at issue would establish the plaintiffs' prima facie case for a constitutional violation.<sup>76</sup> Second, the court approved the district court's decision to consider two government affidavits in favor of the motion, one public and one private, the private affidavit viewed *in camera* and withheld from plaintiffs' counsel entirely.<sup>77</sup>

Finally, the court employed the "mosaic theory"<sup>78</sup> to justify its heightened deference to the Secretary of Defense.<sup>79</sup> To illustrate the

<sup>69</sup> See 418 U.S. 683, 706 (1974).

<sup>70</sup> See *id.*; see also *infra* Part II.B.2.

<sup>71</sup> See *Nixon*, 418 U.S. at 706, 707, 710; see also *infra* Part II.B.4.c.

<sup>72</sup> See *Nixon*, 418 U.S. at 710 (referring to "military or diplomatic secrets"); see also *infra* Part II.B.3.

<sup>73</sup> 598 F.2d 1 (D.C. Cir. 1978).

<sup>74</sup> See *id.* at 3.

<sup>75</sup> *Id.* at 4.

<sup>76</sup> See *id.* at 10–11 (rejecting plaintiffs' argument for a presumption of acquisition to enable them to avoid dismissal).

<sup>77</sup> See *id.* at 6–8.

<sup>78</sup> "The 'mosaic theory' describes a basic precept of intelligence gathering: Disparate items of information, though individually of limited or no utility to their possessor, can take on added significance when combined with other items of information." David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 630 (2005). For more on the mosaic theory generally, see Pozen, *supra*; Christina E. Wells, *CIA v. Sims: Mosaic Theory and Government Attitude*, 58 ADMIN. L. REV. 845 (2006); see also *infra* Part II.B.3.

<sup>79</sup> See *Halkin I*, 598 F.2d at 8–9.

applicability of the mosaic theory, the court described a few of the “number of inferences [that] flow from the confirmation or denial of acquisition,” thus dispensing with the plaintiffs’ “naïve” argument that mere admission or denial of surveillance would not disclose the agencies’ methods and techniques.<sup>80</sup> After *Halkin I*, the mosaic theory became a mainstay in state secrets privilege litigation.<sup>81</sup>

#### D. Trends

Several commentators claim that the executive and judiciary today are using the privilege differently than in the past. Between 1954 and 1972, only six published opinions considered assertions of the state secrets privilege.<sup>82</sup> From 1973 to 2001, sixty-five published opinions considered assertions of the privilege.<sup>83</sup> And since 2002, twenty-six published opinions have dealt with the state secrets privilege.<sup>84</sup> William Weaver and Robert Pallitto argue that “[r]ecent use of the state secrets privilege shows a tendency on the part of the executive branch to expand the privilege to cover a wide variety of contexts.”<sup>85</sup> They further argue that the ease with which the government can invoke the privilege combined with mosaic-theory deference have resulted in the “courts’ demonstrated reluctance to even conduct *in camera* inspections of material before affirming secrecy.”<sup>86</sup> Other commentators find that the government is increasingly using the privilege to *dismiss* entire cases rather than merely to block discovery requests.<sup>87</sup>

A recent article by Robert Chesney disputes these claims.<sup>88</sup> First, Chesney finds the quantitative increase in state secrets privilege claims irrelevant because it is too small to be statistically significant and is potentially attributable to other causes.<sup>89</sup> Turning to the qualitative

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<sup>80</sup> See *Halkin I*, 598 F.2d at 8–9.

<sup>81</sup> See, e.g., *el-Masri v. United States*, 479 F.3d 296, 305 (4th Cir. 2007); *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998); *Black v. United States*, 62 F.3d 1115, 1119 n.5 (8th Cir. 1995); *In re U.S.*, 872 F.2d 472, 475 (D.C. Cir. 1989); *Ellsberg v. Mitchell*, 709 F.2d 51, 58 n.31 (D.C. Cir. 1983).

<sup>82</sup> See Chesney, *supra* note 23, at 1298 chart 1.

<sup>83</sup> See *id.*

<sup>84</sup> This number is based on eighteen cases listed in Chesney’s data, see *id.* at 1330–32, and updated to include an additional eight cases decided between his study and May 28, 2008.

<sup>85</sup> See Weaver & Pallitto, *supra* note 15, at 107; see also FISHER, *supra* note 17, at 212, 245 (noting the increasing use and broadening scope of the state secrets privilege after September 11, 2001).

<sup>86</sup> Weaver & Pallitto, *supra* note 15, at 108.

<sup>87</sup> See Frost, *supra* note 15, at 1932–35; Shayana Kadidal, *The State Secrets Privilege and Executive Misconduct*, JURIST F., May 30, 2006, <http://jurist.law.pitt.edu/forumy/2006/05/state-secrets-privilege-and-executive.php>; see also Weaver & Escontrias, *supra* note 2, at 10 n.25 (observing that cases rarely continue once the government has invoked the privilege).

<sup>88</sup> See Chesney, *supra* note 23.

<sup>89</sup> See *id.* at 1301–02.

use of the privilege, Chesney finds that the government is not applying the privilege more broadly than in the past;<sup>90</sup> that the government's recent use of the privilege to dismiss entire cases is not a break with past usage;<sup>91</sup> and, finally, that no reason exists to believe judicial review of privilege claims has relaxed.<sup>92</sup>

This Note does not enter the above debate. Its focus is not on potential abuse of the privilege in practice; the ideal balance between individuals' litigation interests, the rule of law, and national security; or the extent to which the judiciary should scrutinize state secrets privilege claims in *absolute* terms. Instead, its focus is on the analysis in the abstract and the extent to which the judiciary should scrutinize state secrets privilege claims in *relative* terms. In other words, this Note focuses on developing a conceptual framework to help judges identify which claims of state secrets privilege deserve more or less judicial deference. The following section examines how courts currently analyze state secrets privilege claims.

## II

### THE CONFUSED *REYNOLDS* ANALYSIS

The *Reynolds* opinion has language to support almost any outcome. Consequently, it is common in state secrets privilege cases for the government to quote half of the opinion in its motion to invoke the privilege,<sup>93</sup> for the party seeking the information to quote the other half of the opinion in opposition,<sup>94</sup> and for the court to acknowledge both halves of *Reynolds* before engaging in an unrelated analysis.<sup>95</sup> Indeed, courts tend to substitute for analysis vague

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<sup>90</sup> See *id.* at 1302–04.

<sup>91</sup> See *id.* at 1304–05.

<sup>92</sup> See *id.* at 1305–06.

<sup>93</sup> See, e.g., Memorandum of Points and Authorities in Support of Motion by Intervenor United States to Dismiss or, in the Alternative, for Summary Judgment at 4, *el-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006) (No. 1:05cv1417-TSE-TRJ), *aff'd*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007), available at [http://www.aclu.org/pdfs/safefree/govt\\_mot\\_dismiss.pdf](http://www.aclu.org/pdfs/safefree/govt_mot_dismiss.pdf) (“The state secrets privilege is one of the privileges that belong uniquely to the Executive Branch, facilitating the Chief Executive’s right and duty to protect the military and state secrets of the nation.”).

<sup>94</sup> See, e.g., Memorandum of Points and Authorities in Opposition to the United States’ Motion to Dismiss or, in the Alternative, for Summary Judgment at 15, *el-Masri v. Tenet*, 437 F. Supp. 2d 530 (E.D. Va. 2006) (No. 1:05cv1417-TSE-TRJ), available at [http://www.aclu.org/pdfs/safefree/elmasri\\_final\\_brief.pdf](http://www.aclu.org/pdfs/safefree/elmasri_final_brief.pdf) (“[J]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”) (quoting *United States v. Reynolds*, 345 U.S. 1, 9–10 (1953)).

<sup>95</sup> See, e.g., *el-Masri v. United States*, 479 F.3d 296, 304 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007) (“The *Reynolds* Court recognized . . . that ‘[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers’—no matter how great the interest in national security—but that the President’s ability to preserve state secrets likewise cannot be placed entirely at the mercy of the courts.”) (quoting *Reynolds*, 345 U.S. at 9–10).

passages from *Reynolds*.<sup>96</sup> This section explores the language of the *Reynolds* opinion, noting where inconsistencies and ambiguities have rendered it incoherent.

#### A. The Analysis

The state secrets privilege belongs exclusively to the government, and the government can assert it even if not a party to the action.<sup>97</sup> Only the head of the department with control over the information can invoke the privilege and even then only after personally considering the information at issue.<sup>98</sup> Thus, a private party can neither claim nor waive the privilege.<sup>99</sup> The judge, however, ultimately determines whether the privilege applies.<sup>100</sup> Here, the *Reynolds* court admits, is the “real difficulty.”<sup>101</sup> Although *Reynolds* does not “automatically require a complete disclosure to the judge,”<sup>102</sup> neither can “[j]udicial control over the evidence in a case . . . be abdicated to the caprice of executive officers.”<sup>103</sup> The tension is that “[t]oo much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses.”<sup>104</sup>

*Reynolds* attempted to strike a “compromise”:<sup>105</sup> “It may be possible to satisfy the court, from all the circumstances of the case, that there is a *reasonable danger* that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.”<sup>106</sup> The extent to which the judge should probe the evidence depends on the “showing of necessity” of the party requesting the information.<sup>107</sup> Nevertheless, once the judge is satisfied that “military secrets are at stake,” the privilege applies absolutely, precluding any consideration of injury to the requesting party.<sup>108</sup>

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<sup>96</sup> See, e.g., *Black v. United States*, 62 F.3d 1115, 1118 (8th Cir. 1995) (stating that *Reynolds*’s principles “‘emerge quite clearly from the available precedents’” but then proceeding to quote *Reynolds*’s frequently cited and troublesome passages, such as “‘[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect’”) (quoting *Reynolds*, 345 U.S. at 7).

<sup>97</sup> See *Reynolds*, 345 U.S. at 7.

<sup>98</sup> *Id.* at 7–8.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 8 n.21 (“[T]he decision ruling out such documents is the decision of the judge. . . . It is the judge who is in control of the trial, not the executive.”) (quoting *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624, 642 (H.L.)) (emphasis omitted).

<sup>101</sup> *Id.* at 8.

<sup>102</sup> *Id.* at 10.

<sup>103</sup> *Id.* at 9–10.

<sup>104</sup> *Id.* at 8.

<sup>105</sup> *Id.* at 9.

<sup>106</sup> *Id.* at 10 (emphasis added).

<sup>107</sup> *Id.* at 11.

<sup>108</sup> *Id.*

Finally, the judge must determine the consequence of a successful invocation of the privilege.<sup>109</sup> The general rule is that the action proceeds as though the “evidence is unavailable, as though a witness ha[s] died.”<sup>110</sup> But various circumstances exist under which the court would dismiss the entire case:<sup>111</sup> if the privileged information is necessary to the plaintiff’s *prima facie* case;<sup>112</sup> if the very subject matter of the action is a state secret;<sup>113</sup> if the privilege deprives the defendant of an otherwise valid defense;<sup>114</sup> if the privileged information is not in the government’s possession;<sup>115</sup> and if without the privileged information, the plaintiff cannot establish standing.<sup>116</sup> In practice, few cases continue after the government successfully invokes the privilege.<sup>117</sup>

## B. The Problems

Despite this framework, *Reynolds* has proven more useful as a source of rhetoric than as a source of analytical guidance.<sup>118</sup> This subpart addresses several areas of confusion: the situations in which the privilege applies; the relevance of competing interests; and the meaning, scope, and rationale of judicial deference to state secrets claims.

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<sup>109</sup> See *id.*; *Ellsberg v. Mitchell*, 709 F.2d 51, 64 (D.C. Cir. 1983).

<sup>110</sup> *Ellsberg*, 709 F.2d at 64 (quoting *McCORMICK ON EVIDENCE* 233 (Edward W. Cleary ed., 2d ed. 1972)).

<sup>111</sup> Some courts have deemed dismissal “draconian.” See, e.g., *In re Sealed Case*, 494 F.3d 139, 151 (D.C. Cir. 2007); *In re United States*, 872 F.2d 472, 477 (D.C. Cir. 1989).

<sup>112</sup> See *Ellsberg*, 709 F.2d at 65 (finding dismissal appropriate if “plaintiffs were manifestly unable to make out a *prima facie* case without the requested information”); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc) (per curiam); *In re United States*, 872 F.2d at 476.

<sup>113</sup> See *Reynolds*, 345 U.S. at 11 n.26 (citing *Totten v. United States*, 92 U.S. 105 (1875)); *el-Masri v. United States*, 479 F.3d 296, 311 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007); *Sterling v. Tenet*, 416 F.3d 338, 348 (D.C. Cir. 2005); *Kasza v. Browner*, 133 F.3d 1159, 1170 (9th Cir. 1998); *Black v. United States*, 62 F.3d 1115, 1119 (8th Cir. 1995); *Bareford v. Gen. Dynamics Corp.*, 973 F.2d 1138, 1140–41 (5th Cir. 1992). Some courts consider the issue of whether the very subject matter of the action is a state secret to be a threshold question distinct from whether a particular document or topic is a state secret. See, e.g., *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1201–02 (9th Cir. 2007).

<sup>114</sup> See *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004), *cert. denied*, 543 U.S. 1000 (2004); *Kasza*, 133 F.3d at 1166; *Bareford*, 973 F.2d at 1141; see also *In re Sealed Case*, 494 F.3d at 150 (stating that the defense must be more than “potential” or “colorable”).

<sup>115</sup> See *Farnsworth*, 635 F.2d at 281 (reasoning that the parties would have an incentive to probe too close to the sensitive information); see also *Ellsberg*, 709 F.2d at 65 (discussing the *Farnsworth* rule).

<sup>116</sup> See *Al-Haramain Islamic Found.*, 507 F.3d at 1205.

<sup>117</sup> See *Weaver & Escontrias*, *supra* note 2, at 10 n.25.

<sup>118</sup> See *Chesney*, *supra* note 23, at 1251 (observing that “much uncertainty remains regarding [the] parameters and justifications” of the state secrets privilege).

### 1. Reynolds's Trigger Test

*Reynolds's* trigger test derives from the following passage: "It may be possible to satisfy the court, from all the circumstances of the case, that there is a *reasonable danger* that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged."<sup>119</sup> This test clearly incorporates the magnitude and likelihood of harm to the public. The magnitude of harm is implicit in the phrase "national security," while the requisite likelihood that that harm will occur is implicit in the phrase "reasonable danger." As a function of these two variables, *Reynolds* intended to design a privilege that avoids injury to the public caused by the undermining of national security.<sup>120</sup>

The trigger test's great ambiguity is whether the magnitude and likelihood variables refer to *actual* public harm or whether they refer to some proxy that has a reasonable chance of leading to actual public harm. For example, although a near-100 percent chance may exist that litigation without the privilege would disclose sensitive information, perhaps only a 10 percent chance exists that bad people would *actually* use that information to harm the public. Between those two extreme possibilities, perhaps a 50 percent chance exists that should litigation proceed without the privilege, bad people would acquire sensitive information and increase their *ability* to harm the public. Thus, a broad disclosure-to-harm spectrum exists with an infinite number of inferential steps required to find public harm from the disclosure of sensitive information.

The *Reynolds* court repeatedly emphasized the "reasonable possibility that military secrets were involved,"<sup>121</sup> suggesting that the Court was focusing on the disclosure of sensitive information, rather than actual harm to the public. At the same time, however, the Court also spoke of disclosure that "might be dangerous because injurious" to the public.<sup>122</sup> The critical question is whether the *Reynolds* analysis focuses on both disclosure and harm as distinct factors or whether it equates the two.

One possibility is that the *Reynolds* court intended the government to focus on harm and the reviewing judge to focus on disclosure. According to one commentator, *Reynolds* uses the phrase "reasonable danger" to refer to two distinct measures: a measure of potential harm to the public and a measure of whether the documents at issue *actually*

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<sup>119</sup> United States v. Reynolds, 345 U.S. 1, 10 (1953) (emphasis added).

<sup>120</sup> See *id.* ("[T]he court should not jeopardize the security which the privilege is meant to protect . . .").

<sup>121</sup> *Id.* at 11; see *id.* at 10.

<sup>122</sup> *Id.* at 9.



contain sensitive information.<sup>123</sup> Of these two measures, the government's focus is clearly on potential harm to the public.<sup>124</sup> Given this governmental focus, however, it makes little sense for the reviewing judge to focus *exclusively* on whether the documents in fact contain the information that the department invoking the privilege wants to protect. In addition to being an ineffective method of reviewing the government's invocation of the privilege, this form of review would also be disrespectful. Under *Reynolds*, the head of a department must personally review the requested information before invoking the privilege.<sup>125</sup> Therefore, if the judge focuses exclusively on whether the documents contain the information that the head of the department claims, the judge's decision hinges entirely on an assessment of the head of the department's honesty. In contrast, if the judge focuses on the *effect* the information might have if leaked, the judge questions the head of the department's judgment.

If *Reynolds* simply failed to appreciate the difference between disclosure and harm, it leaves open the question of where on the disclosure-to-harm spectrum the government and reviewing judge should focus their analyses. "National security" is an unfortunately generic term.<sup>126</sup> In the state secrets privilege context, undermining national security refers to impairing defense capabilities,<sup>127</sup> disclosing intelligence-gathering methods or capabilities,<sup>128</sup> and disrupting diplomatic relations with foreign governments.<sup>129</sup> Each of these threats to national security requires a different chain of inferences to find harm from disclosure. For example, consider the disclosure of intelligence-gathering methods or capabilities. What is the harm? Do the operations for which the government uses the methods matter? Do the potential consequences—to human life or otherwise—of disclosing those methods or abandoning particular operations as a result of disclosing details of those operations matter? For an example of a longer

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<sup>123</sup> See Chesney, *supra* note 23, at 1287.

<sup>124</sup> See *Reynolds*, 345 U.S. at 4–5 (quoting the Secretary of the Air Force as noting that "it would not be in the public interest to furnish this report" and the JAG officer handling the case as arguing that "the demanded material could not be furnished 'without seriously hampering national security'").

<sup>125</sup> See *id.* at 8.

<sup>126</sup> See Weaver & Escontrias, *supra* note 2, at 70 (finding that national security is a "nimble term that effortlessly adapts to myriad contexts" and quoting former Director of Central Intelligence, Sidney Souers, as saying that the term is merely a "point of view"); see also *N.Y. Times v. United States*, 403 U.S. 713, 739–40 (1971) (noting that "national defense" is a generic term not susceptible to precise definition) (citing *Gorin v. United States*, 312 U.S. 19, 28 (1941)); *Jabara v. Kelley*, 75 F.R.D. 475, 483 n.25 (E.D. Mich. 1977) (same).

<sup>127</sup> See *Reynolds*, 345 U.S. at 6–7, 10.

<sup>128</sup> See *Halkin v. Helms (Halkin II)*, 690 F.2d 977, 993 (D.C. Cir. 1982); *Halkin I*, 598 F.2d 1, 8–9 (D.C. Cir. 1978).

<sup>129</sup> See *Halkin II*, 690 F.2d at 990 n.53; *Republic of China v. Nat'l Union Fire Ins. Co.*, 142 F. Supp. 551, 556 (D. Md. 1956).

chain of inferences, consider the disruption of diplomatic relations with foreign governments. The chain of inferences might be as follows: disclosure would reveal conversations between the United States and a second country regarding a third country; those conversations, in turn, would strain the already delicate relationship between the United States and the third country; as a result, this strained relationship would cause public harm through some unforeseen consequence.<sup>130</sup>

Understandably, courts are reluctant to engage in this type of analysis. Indeed, assuming that events with high probabilities of causing harm actually cause harm makes sense. For example, impairment of defense capabilities, although not directly harming the public, may have a high enough probability of causing public harm to remove the need to speculate about causation. It is important, however, to recognize that impaired defense capabilities is not the same thing as harm to the public. Yet the *Reynolds* analysis fails entirely to account for the causal—and sometimes very speculative—inferences required to find public harm from disclosure. Moreover, the *Reynolds* analysis also fails to account for the magnitude of public harm. For example, strained diplomatic relations might result in a wide range of public harms, from economic recession to nuclear war. In sum, because *Reynolds* does not require the government to articulate the potential public harm, even in general terms, the likelihood variable of the trigger test is insufficient and the magnitude variable is constrained only by the vague category of “national security” threat.

The lower courts have struggled to implement the *Reynolds* standard. Some courts have rephrased the reasonable danger standard to bridge the gap between disclosure and harm.<sup>131</sup> For example, in *Halkin I*, the court referred to the standard as the “‘reasonable danger’ that confirmation or denial that a particular plaintiff’s communications have been acquired would disclose NSA capabilities and other valuable intelligence information to a sophisticated intelligence analyst.”<sup>132</sup> Similarly, in *Ellsberg v. Mitchell*, the court referred to the standard as whether “there is a ‘reasonable danger’ that revelation of the information in question would either enable a sophisticated analyst to gain insights into the nation’s intelligence-gathering methods and capabilities or would disrupt diplomatic relations with foreign governments.”<sup>133</sup> *Halkin I* and *Ellsberg* both focus their analysis on a step in the middle of the disclosure-to-harm spectrum: the likelihood that a

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<sup>130</sup> The first two steps are based on *Nat’l Union Fire Ins.*, 142 F. Supp. at 553.

<sup>131</sup> Whether courts are actually applying the standard differently is unclear because the details of these cases are often classified.

<sup>132</sup> *Halkin I*, 598 F.2d at 10 (citations omitted).

<sup>133</sup> 709 F.2d 51, 59 (D.C. Cir. 1983).

foreign agent might obtain and understand information that could harm the public.<sup>134</sup>

Other lower courts have interpreted the standard as focusing more directly on the harm to the public. In *Halkin II*, the court stated that “the determination is whether the showing of the harm that might reasonably be seen to flow from disclosure is adequate in a given case to trigger the absolute right to withhold the information sought in that case.”<sup>135</sup>

In most cases, it is not clear how the court is applying the test. Courts will commonly quote the ambiguous language from *Reynolds*<sup>136</sup> and move on without clarifying how they applied the standard.<sup>137</sup> Often, courts simply don’t acknowledge the ambiguity. For example, in *Tenenbaum v. Simonini*, the court articulated a standard somewhere in the middle of the disclosure-to-harm spectrum<sup>138</sup> and then attributed that standard to *Reynolds*, including, in a parenthetical, a quote of *Reynolds*’s ambiguous but seemingly disclosure-focused standard.<sup>139</sup>

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<sup>134</sup> Compare *Halkin I* and *Ellsberg to Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395 (D.C. Cir. 1984). In *Northrop*, the Department of Defense (DOD) provided a list of the categories of sensitive information requested by the other party. *Id.* at 400. These categories included communications with foreign governments, letters between the DOD and the Secretary of State or the President, studies of the force structures of foreign countries, and recommendations relating to military aircraft sales. *See id.* The DOD then correlated each category to a specific “harm” (although still an inference removed from injury to the public), such as adversely affecting U.S. relations with Iran, revealing defense capabilities to foreign countries, and exposing sources of intelligence information. *See id.* The DOD even explained the magnitude of the threat, suggesting that disclosure would have “‘irreparable effects upon the national security and international relations of the United States.’” *Id.* (quoting Aff. and Claim of Privilege of the Secretary of Defense ¶ 7) (emphasis added).

<sup>135</sup> 690 F.2d 977, 990 (D.C. Cir. 1982). The *Halkin II* court may not have actually focused on harm to the public. In one passage, the court states that “it is obvious that the exposure of one who acted—and indeed may still be acting—as a CIA operative here and abroad would pose a threat to our diplomatic and military interests”; elsewhere it states that disclosure might render foreign government officials “subject to political or legal action” as a consequence of cooperating with the CIA. *Id.* at 993. It is unclear whether the government affidavit spelled out, in more specific terms, how disclosure could potentially result in public harm.

<sup>136</sup> “It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.” *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

<sup>137</sup> *See, e.g.,* *el-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007); *Sterling v. Tenet*, 416 F.3d 338, 343–44 (4th Cir. 2005); *Crater Corp. v. Lucent Techs., Inc.*, 423 F.3d 1260, 1266 (Fed. Cir. 2005); *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1021 (Fed. Cir. 2003); *Trulock v. Lee*, 66 F. App’x 472, 475 (4th Cir. 2003) (*per curiam*); *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998).

<sup>138</sup> *See Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004) (“[T]he state secrets doctrine applies because a reasonable danger exists that disclosing the information in court proceedings would harm national security interests . . .”).

<sup>139</sup> *See id.* (characterizing *Reynolds* as permitting “courts [to] accept the government’s assertion of the state secrets privilege if they are satisfied that there is a ‘reasonable danger’

In sum, *Reynolds* does not distinguish the risk of disclosing sensitive information from the risk that disclosing that information would harm the public. A government official who is aware of the contents of the requested information bases invocation of the privilege on the likelihood of harm to the public. In doing so, the government official must consider the inferential steps required to get from disclosure to harm. It is not clear, however, whether *Reynolds* intended reviewing courts to evaluate the official's judgment in the disclosure-to-harm analysis or to take the vastly more restrained—yet, at the same time, less respectful—role of reviewing only the official's honesty.

2. *Where the Trigger Test and Deference Overlap: The Requesting Party's Interest*

*Reynolds*, at least implicitly,<sup>140</sup> sets forth the ingredients for a qualified privilege—the likelihood and magnitude of harm to the public as well as the requesting party's interest—while creating an absolute privilege by virtue of how it organizes those ingredients. The Court addressed the likelihood and magnitude of harm in the trigger test context: the state secrets privilege does not apply unless a “reasonable danger” exists that disclosure will undermine national security.<sup>141</sup> But the Court addressed the requesting party's interest when determining the amount of judicial deference the government receives: the more compelling the party's need for the information, the more information the judge should require when reviewing the privilege claim.<sup>142</sup> This section concludes that a reviewing judge should consider the public's interest and the requesting party's interest together as a part of the trigger test rather than when determining the appropriate amount of judicial deference.

In state secrets privilege cases, deference emerges in one principal way:<sup>143</sup> how deeply the judge should probe the requested information. *Reynolds* speaks to this issue in two passages. First, after disclaiming the notion that a “court may automatically require a complete disclosure to the judge,”<sup>144</sup> the Court continued:

It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger . . . . When this is the case . . . the court should not jeopardize the security which the privi-

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that disclosing the evidence will expose information that ‘in the interest of national security, should not be divulged’”).

<sup>140</sup> See *supra* Part II.B.1 (concluding that *Reynolds* equated the risk of disclosure of sensitive information with the risk of harm to the public).

<sup>141</sup> *United States v. Reynolds*, 345 U.S. 1, 10 (1953); see also *supra* Part II.B.1.

<sup>142</sup> See *Reynolds*, 345 U.S. at 11.

<sup>143</sup> As this Note explains below, issues of deference could also emerge in other ways if there were no cost to submitting sensitive information for a judge's *in camera* review.

<sup>144</sup> See *Reynolds*, 345 U.S. at 10.

lege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.<sup>145</sup>

Then, three paragraphs later, the Court appeared to elaborate on this standard:

In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.<sup>146</sup>

But does the second passage simply elaborate on the first? Does the first passage speak to deference at all? A better way to read the first passage is that it simply instructs judges not to force the disclosure of information that will not aid them in their decision. *Trulock v. Lee* provides an example of a case in which a court appropriately declined to review information that would not assist it in its decision.<sup>147</sup> The plaintiff in *Trulock*, the former head of the Office of Energy Intelligence, brought a suit against Lee, accusing Lee and two other officials of defaming him "with statements that his part in the investigation of Lee [for mishandling sensitive nuclear weapons information] was motivated by racial bias."<sup>148</sup> Trulock requested a government report that summarized the Department of Justice's findings from its investigation of the nuclear weapons matter.<sup>149</sup> After the United States intervened and had the case dismissed on the ground of state secrets privilege, Trulock appealed and challenged the court's refusal to examine the report *in camera*.<sup>150</sup> In rejecting his request, the Fourth Circuit reasoned that because "[t]he subject matter of the privileged information and of the lawsuit are the same knowing the particular contents of specific documents would not have assisted the court's decision."<sup>151</sup> In other words, in cases where what makes the information relevant also makes it sensitive, the courts have nothing to gain from *in camera* review. In such cases, therefore, even if *in camera* review creates only an insignificant risk to national security, a judge should not probe the sensitive information.

The second passage, on the other hand, suggests a different way of analyzing the issue. Here, the rationale seems to be that a greater risk is acceptable when the requesting party's need is great. In *Reyn-*

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<sup>145</sup> *Id.* at 10.

<sup>146</sup> *Id.* at 11.

<sup>147</sup> 66 F. App'x 472, 473 (4th Cir. 2003) (per curiam)

<sup>148</sup> *Id.* at 473.

<sup>149</sup> *Id.* at 473-75.

<sup>150</sup> *Id.* at 475-77.

<sup>151</sup> *Id.* at 477-78.

*olds*, for example, the Court reasoned that *in camera* review was inappropriate because the plaintiffs did not need the requested information to make their case.<sup>152</sup> But if this is the rationale, the analysis is inadequate because it fails to consider the magnitude and likelihood of the national security threat. Although it is true that the stakes are higher when the requesting party's interest is great, it is also true that the stakes are higher when the magnitude and likelihood of harm to the public is great.

Perhaps sensing this inadequacy, the D.C. Circuit in *Ellsberg v. Mitchell*<sup>153</sup> elaborated on *Reynolds's* deference calculus. *Ellsberg* found "two critical considerations"<sup>154</sup> relevant to "[w]hether (and in what spirit) the trial judge . . . should examine the materials sought to be withheld."<sup>155</sup> In addition to the requesting party's showing of need, "the more plausible and substantial the government's allegations of danger to national security, in the context of all the circumstances surrounding the case, the more deferential should be the judge's inquiry into the foundations and scope of the claim."<sup>156</sup> Although clearly invoking the second *Reynolds* passage,<sup>157</sup> *Ellsberg* goes significantly further. Under *Ellsberg's* balancing test, in addition to the requesting party's need, the judge should consider the *likelihood* and *magnitude* of the government's claimed harm. In other words, the very considerations that would ordinarily accompany a qualified privilege—the balancing of competing interests discounted for their likelihood—determine instead the amount of judicial deference.

*Ellsberg's* adaptation of *Reynolds's* deference calculus highlights the inadequacy of *Reynolds's* trigger test: How can a privilege be *absolute* when it is based on a broad category of national security threats, without any additional consideration of the magnitude of the public harm that might result from those threats, and when it includes only a vague requirement that those harms be likely to occur? The *Ellsberg* court appeared to recognize this problem and attempted to mitigate it by according the executive less deference in cases where the harm is unlikely or insubstantial. The problem is that deference only affects the judge's determination of whether the circumstances of the case satisfy the trigger test; it does not factor into the trigger test itself. As a result, a trivial national security threat that is right at the threshold of

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<sup>152</sup> See *United States v. Reynolds*, 345 U.S. 1, 11 (1953); cf. *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) ("We reviewed the Sealed Document *in camera* because of Al-Haramain's admittedly substantial need for the document to establish its case.").

<sup>153</sup> 709 F.2d 51 (D.C. Cir. 1983).

<sup>154</sup> See *Ellsberg*, 709 F.2d at 58.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 59.

<sup>157</sup> See *supra* text accompanying note 146.

being reasonably likely to occur will always trump the requesting party's most compelling showing of need.

The cost of *Reynolds* and *Ellsberg*'s misplaced analysis is not worth the benefit of the absolute privilege it creates. The benefit of the privilege's absolute nature is largely illusory—more valuable symbolically than in its legal effect. The qualifier only means that where the privilege applies, it applies without exception. The real question is under what conditions does the privilege apply. Admittedly, differences between the state secrets privilege and the executive privilege, for example, do support making the former *less* qualified than the latter. Whereas an individual's need might outweigh a weak showing of need for executive privilege, an individual's need can *never* outweigh the public's safety.<sup>158</sup> But it is not true that a very *remote* probability of harm to the public should *always* outweigh an individual's interest. Therefore, the requesting party's interest should more appropriately join the magnitude and likelihood of harm to the public in the initial trigger test.<sup>159</sup> The amount of information a judge should review before affirming an executive official's privilege claim ought to track the rationale driving judicial deference, an area this Note explores below.

### 3. Deference: How Much

Despite *Reynolds*'s instruction that deference is a function of the requesting party's need, the lower courts have generally taken their guidance from a different source, employing a static "utmost deference" in all contexts.<sup>160</sup> Although the popularity of this standard is further evidence of the inadequacy of *Reynolds*'s deference calculus, the standard's rigidity ignores its own driving rationale.

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<sup>158</sup> There are other counter-balancing interests in addition to the requesting party's interest, such as the public's interest in the rule of law.

<sup>159</sup> See *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1202 (9th Cir. 2007) ("In deciding whether the privilege attaches, we may consider a party's need for access to the allegedly privileged information."). It is not clear whether the Ninth Circuit in *Al-Haramain* intentionally shifted the relevance of the requesting party's interest or whether the court simply misunderstood *Reynolds* on this point. Later in the opinion, the court justified its review of classified documents on the basis of the requesting party's interest. See *id.* at 1203.

<sup>160</sup> Not all circuits have adopted the utmost deference standard. Recently, in *Al-Haramain Islamic Found., Inc. v. Bush*, the Ninth Circuit discussed judicial deference in the state secrets privilege context using language strikingly different from that used by other circuits: "We take very seriously our obligation to review the documents with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege." *Al-Haramain*, 507 F.3d at 1203. In the same passage, however, the court qualified this standard: "That said, we acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena." *Id.*

The modern source of guidance regarding judicial deference in the state secrets privilege context is *United States v. Nixon*.<sup>161</sup> Prior to *Nixon*, courts were not clear how the state secrets privilege related to the better-known executive privilege.<sup>162</sup> In *Nixon*, the President claimed the inherent power to withhold documents from the court.<sup>163</sup> In response to this claim, the Court stated: “[President Nixon] does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the *utmost deference* to Presidential responsibilities.”<sup>164</sup>

Those two words, “utmost deference”—pure dicta themselves—swept through the lower courts. Three years after *Nixon*, they surfaced in a state secrets privilege case for the first time. In *Jabara v. Kelley*, the Eastern District of Michigan stated:

In the *Nixon* case, Chief Justice Burger, in distinguishing Mr. Nixon’s purported claim of executive privilege . . . stated that the utmost deference has always been given to the President’s Article II duties and responsibilities over military and diplomatic matters. This Court believes that the same consideration must be given to the formal claim of privilege [here].<sup>165</sup>

The following year, the D.C. Circuit in *Halkin I* articulated the most frequently cited version of that standard: “The standard of review here is a narrow one. Courts should accord the ‘utmost deference’ to executive assertions of privilege upon grounds of military or diplomatic secrets.”<sup>166</sup> Dissenting from the denial of the petition to rehear the case en banc, Judge Bazelon protested in vain: “The ‘utmost deference’ which the panel has given the government’s *ex parte, in camera* assertions is not justified in precedent, conflicts with other decisions of this court . . . and slights the role of the court in protecting the civil liberties guaranteed by the Fourth Amendment.”<sup>167</sup> Although courts

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<sup>161</sup> 418 U.S. 683 (1974).

<sup>162</sup> See *supra* text accompanying notes 66–68.

<sup>163</sup> See *Nixon*, 418 U.S. at 706, 710.

<sup>164</sup> *Id.* at 710 (emphasis added).

<sup>165</sup> 75 F.R.D. 475, 492 (E.D. Mich. 1977).

<sup>166</sup> 598 F.2d 1, 9 (D.C. Cir. 1978) (quoting *Nixon*, 418 U.S. at 710).

<sup>167</sup> *Id.* at 14 (Bazelon, J., dissenting from the denial of the petition for rehearing en banc).



have used slight variations on the utmost deference standard,<sup>168</sup> this standard has clearly been the norm since *Halkin I*.<sup>169</sup>

#### 4. Deference: Why

A court following *Nixon* and *Reynolds* is on uneasy ground.<sup>170</sup> Under *Nixon*, utmost deference is appropriate whenever a court is reviewing an executive determination concerning military and diplomatic matters.<sup>171</sup> Under *Reynolds*, however, deference operates on a sliding scale.<sup>172</sup> To reconcile these standards and apply them to new and often complicated fact patterns, it is important to understand the rationale for judicial deference in the state secrets privilege context. This section explores potential rationales.

##### a. Risk of Exposure

In *Reynolds*, the concern was exposure. *Reynolds* states that “[t]oo much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect . . . .”<sup>173</sup> This rationale also supports *Reynolds*’s instruction to accord the government less deference when the requesting party’s need is great. If the Court justifies not reviewing all of the relevant documents on the ground that it minimizes harm, it makes sense that a weighty showing by the requesting party would tip the scale, warranting a more probing review. The exposure rationale therefore also supports *Ellsberg*’s balancing approach since a greater threat to national security might neutralize the requesting party’s need, tipping the scale back in the other direction.<sup>174</sup>

The risk-of-exposure rationale encompasses two distinct concerns. First is the risk that judges will misuse or leak the information

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<sup>168</sup> The most common alternative is “considerable deference,” first used in *Ellsberg v. Mitchell*, 709 F.2d 51, 58 (D.C. Cir. 1983), but used frequently thereafter. See, e.g., *Tenenbaum v. Simonini*, 372 F.3d 776, 777 (6th Cir. 2004); *Moliero v. FBI*, 749 F.2d 815, 822 (D.C. Cir. 1984). In *Ellsberg*, the court employed the “considerable deference” standard but cited the standard to *Halkin I*, *Halkin II*, and *Jabara v. Kelley*, all of which use the “utmost deference” articulation. *Ellsberg*, 709 F.2d at 58 n.34. Therefore, it appears unlikely that *Ellsberg* intended its standard to be substantively different from *Nixon*’s.

<sup>169</sup> See, e.g., *el-Masri v. United States*, 479 F.3d 296, 305 (4th Cir. 2007), cert. denied, 128 S. Ct. 373 (2007); *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1021 (Fed Cir. 2003); *Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998); *Black v. United States*, 62 F.3d 1115, 1119 (8th Cir. 1995).

<sup>170</sup> Because *Ellsberg*’s deference calculus includes more variables than *Reynolds*’s, a court following *Nixon* and *Ellsberg* is on even shakier ground. This is, in fact, a problem faced by a substantial number of courts because not only does the D.C. Circuit, which decided *Ellsberg*, handle more state secrets privilege claims than any other circuit, but also because several other circuits have adopted the *Ellsberg* approach.

<sup>171</sup> See *supra* text accompanying notes 163–64.

<sup>172</sup> See *supra* text accompanying notes 105–17.

<sup>173</sup> *United States v. Reynolds*, 345 U.S. 1, at 8 (1953).

<sup>174</sup> See *supra* text accompanying notes 153–57.

themselves.<sup>175</sup> Commentators have nearly universally condemned this rationale for refusing *in camera* review.<sup>176</sup> Second is the risk that the process of reviewing information *in camera*, despite everyone's best intentions, will invariably result in leaked information.<sup>177</sup> But according to Robert Chesney, this concern is a carryover from the English system in which *in camera* review was not an option.<sup>178</sup>

The risk of exposure is not substantial enough to drive judicial deference. Yet, if there were no risk of exposure, there would be no danger in providing a reviewing judge with all the relevant information. Therefore, disclosure must have its costs, even if insubstantial. If a judge had little need for additional information, even an insubstantial cost would justify withholding the information. The real question then is what benefit, if any, additional information provides the reviewing judge.

#### b. *Institutional Competency*

Despite *Reynolds's* reliance on the risk-of-exposure rationale, the institutional competency rationale has attracted the most support. As Robert Chesney puts it: "Judges in general cannot be expected to have the requisite expertise, experience, and knowledge necessary to make fine-grained decisions regarding the national security implications of

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<sup>175</sup> See, e.g., *Sterling v. Tenet*, 416 F.3d 338, 344 (4th Cir. 2005) ("Courts are not required to play with fire and chance further disclosure—inadvertent, mistaken, or even *intentional*—that would defeat the very purpose for which the privilege exists.") (emphasis added); *Zagel*, *supra* note 19, at 886, 897 ("[T]here are some things which even a judge cannot be permitted to see."). This may be what the court was suggesting in *Halkin I*: "It is not to slight judges, lawyers, or anyone else to suggest that any such disclosure carries with it serious risk that highly sensitive information may be compromised." 598 F.2d 1, 7 (D.C. Cir. 1978) (quoting *Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1369 (4th Cir. 1975), *cert. denied*, 421 U.S. 992 (1975)).

<sup>176</sup> See, e.g., 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2379, at 812 n.6 (John T. McNaughton ed., 1961) ("Shall every subordinate in the department have access to the secret, and not the presiding officer of justice? Cannot the constitutionally coordinated body of government share the confidence?"); *Weaver & Pallitto*, *supra* note 15, at 98 ("It is unclear . . . why the lowliest private with a security clearance is held more trustworthy than federal judges to handle classified information."); *FISHER*, *supra* note 17, at 255 ("Judges take the same oath to protect and defend the Constitution, and judges are not tempted, as executive officers are, to selectively leak classified and secret documents to the public when it is advantageous to the administration."); see also James Madison, Remarks at the Virginia Ratification Convention (June 20, 1788), in 3 JONATHAN ELLIOTT, *DEBATES ON THE FEDERAL CONSTITUTION* 531, 535 ("Were I to select a power which might be given with confidence, it would be judicial power.").

<sup>177</sup> See *Ellsberg v. Mitchell*, 709 F.2d 51, 57 n. 31 (D.C. Cir. 1983) ("In our own chambers, we are ill equipped to provide the kind of security highly sensitive information should have.") (quoting *Clift v. United States*, 597 F.2d 826, 829 (2d Cir. 1979)).

<sup>178</sup> See Chesney, *supra* note 23, at 1279–80 (discussing *Beatson v. Skene*, (1860) 157 Eng. Rep. 1415, 1421 (Exch. Div.), in which the court noted that review by the courts could not take place in private).

disclosure . . . .”<sup>179</sup> Although criticized by some,<sup>180</sup> those criticisms have largely focused on the *degree* to which executive officials are in a better position to make national security–related decisions. The consensus is that although a complete abdication of judicial oversight is undesirable, institutional competency differences warrant some deference to executive decision making.

If the justification for deference is grounded in expertise differences between the judiciary and the executive branch, should the amount of deference vary depending on the size of the expertise difference?<sup>181</sup> In *Halkin I*—the first application of *Nixon’s* utmost deference standard by a circuit court in a state secrets privilege case<sup>182</sup>—the D.C. Circuit invoked the mosaic theory to justify its heightened deference:

“The significance of one item of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.”<sup>183</sup>

Five years later, in *Ellsberg v. Mitchell*, the D.C. Circuit again expressly relied upon the institutional competency rationale: “[T]he probability that a particular disclosure will have an adverse effect on national se-

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<sup>179</sup> See *id.* at 1288; see also Weaver & Pallitto, *supra* note 15, at 89 (“Agency officials argue, and courts often agree, that judges and lay people are incompetent to assess the danger that the release of information may pose to national security; the invocation of ‘national security’ gives strong, almost talismanic, force to claims of agency expertise.”); Stone, *supra* note 3, at 1316 (“[I]ndividual judges have relatively little first-hand experience with national security matters. Such cases arise infrequently, and judges are relative novices when it comes to assessing the possible implications of their decisions for national security.”); Zagel, *supra* note 19, at 897 (“Only an experienced intelligence officer can determine properly whether certain material should be kept secret.”).

<sup>180</sup> See Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 75 (2004) (“Deliberative processes within a unitary branch are likely to lead to an amplification of preexisting tendencies, not toward a system of internal checks and balances.”); Wells, *supra* note 21, at 929–36 (applying psychology of risk assessment to executive decision making during times of emergency and finding a strong historical trend of overreaction).

<sup>181</sup> Precedent in other contexts, particularly in the administrative law context, supports such a spectrum. See *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (“The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency’s care, its consistency, formality, and relative expertness . . . .”) (footnotes omitted); see also *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (finding judicial review inappropriate where “an agency decision . . . involves a complicated balancing of a number of factors which are peculiarly within its expertise”).

<sup>182</sup> See *supra* text accompanying notes 73–81.

<sup>183</sup> See *Halkin I*, 598 F.2d 1, 8–9 (D.C. Cir. 1978) (quoting *United States v. Marchetti*, 466 F.2d 1309, 1318 (4th Cir. 1972)).

curity is difficult to assess, particularly for a judge with little expertise in this area.”<sup>184</sup> Again, the court immediately followed this remark by invoking the mosaic theory.<sup>185</sup> Other courts have also highlighted the link between the utmost deference standard and the mosaic theory.<sup>186</sup>

All information, to some extent, is part of a mosaic. As David Pozen observed in *The Mosaic Theory, National Security, and the Freedom of Information Act*, “Inasmuch as the rush to judicial collapse in the face of ‘mosaic’ arguments has been predicated on a belief in their uniqueness, it has lacked any legitimate analytic basis.”<sup>187</sup> Mosaic cases are different in degree rather than in kind. While all information is only useful insofar as it is combined with other information, for some mosaics, the link between the piece and the whole is readily apparent. For other mosaics, however, the link requires a degree of speculation and expertise for which a judge is ill-suited. Since differences in institutional competency vary from case to case, a more rational approach might be to vary judicial deference accordingly; but whether judges are free to exert more or less deference on a case-by-case basis depends, in part, on whether the Constitution mandates a more static standard.

### c. *Separation of Powers*

Articles II and III of the U.S. Constitution are the Scylla and Charybdis of the state secrets privilege. If courts defer entirely to the executive, they encounter one hazard; if courts disregard the executive’s national security and foreign relations interests entirely, they encounter a different hazard.<sup>188</sup> The courts’ judicious response has been to steer as far from both as possible. The result is deferential judicial oversight.<sup>189</sup> The important question, however, is whether the Constitution requires this compromise.

An exploration of the privilege’s constitutional foundation must begin with *Reynolds*. Before *Reynolds* reached the Supreme Court, the Third Circuit had its own constitutional concerns. In response to the government’s argument that the court should not independently consider the privilege claim once invoked, Judge Maris stated:

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<sup>184</sup> *Ellsberg v. Mitchell*, 709 F.2d 51, 57 n.31 (D.C. Cir. 1983).

<sup>185</sup> *See id.* at 58.

<sup>186</sup> *See, e.g., Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998); *In re United States*, 872 F.2d 472, 475 (D.C. Cir. 1989).

<sup>187</sup> *See Pozen, supra* note 78, at 665.

<sup>188</sup> *See Note, supra* note 15, at 581–82 (“When the courts face a valid privilege claim, the Constitution poses a dilemma: the courts must respect the executive’s constitutional responsibility to protect national security interests; they also, however, must enforce constitutional as well as congressional constraints on executive powers.”).

<sup>189</sup> *See Robert J. Pushaw, Jr., Defending Deference: A Response to Professors Epstein and Wells*, 69 Mo. L. Rev. 959, 963 (2004) (describing the Supreme Court’s policy of extraordinary deference to the executive on military matters as a “compromise position”).

[T]o hold that the head of an executive department of the Government in a suit to which the United States is a party may conclusively determine the Government's claim of privilege is to abdicate the judicial function and permit the executive branch of the Government to infringe the independent province of the judiciary as laid down by the Constitution.<sup>190</sup>

In its petition for writ of certiorari, the government persisted, asking whether the judiciary had the power "to order production of documents which the executive chooses to withhold, or to substitute its judgment for the judgment of the executive as to whether certain documents can be disclosed consistently with the public interest."<sup>191</sup> The respondents argued that Congress waived the executive's power to withhold documents in the Federal Tort Claims Act.<sup>192</sup> It was in response to these positions that the Court uttered the two words that have so muddled the waters: "Both positions," stated the Court, have "constitutional overtones."<sup>193</sup> The Court then announced its "narrower ground for decision."<sup>194</sup> From this we can presume that the ground for the decision was ultimately free of constitutional overtones.<sup>195</sup> Therefore, although the Court was attempting to avoid a holding with constitutional overtones, *Reynolds* tells us only that the extreme positions—*complete* judicial abdication and *no* privilege at all—have such overtones. Everything in between these options is fair game.

*United States v. Nixon* gave more ammunition to those eager to constitutionalize the privilege. The relevant passage<sup>196</sup> states: "[President Nixon] does not place his claim of privilege on the ground they are military or state secrets. As to these areas of Art. II duties . . ."<sup>197</sup>

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<sup>190</sup> *Reynolds v. United States*, 192 F.2d 987, 997 (3rd. Cir. 1951), *rev'd* 345 U.S. 1 (1953). The dissenting justices in the Supreme Court decision simply adopted the Third Circuit's opinion. 345 U.S. at 12.

<sup>191</sup> Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit at 10, *United States v. Reynolds*, 345 U.S. 1 (1953) (No. 21).

<sup>192</sup> See *Reynolds*, 345 U.S. at 6 (discussing respondents' argument).

<sup>193</sup> *Id.* In a footnote, the Court elaborated on the government's argument that it has "an inherent executive power which is protected in the constitutional system of separation of power." *Id.* at n.9. Although the Court prefaced this remark with "[i]t is said," some have mistakenly read the footnote as endorsing this argument. See, e.g., *Halkin I*, 598 F.2d 1, 14 n.9 (D.C. Cir. 1978) (Bazelon, J., dissenting from the denial of the petition for rehearing en banc) ("In *Reynolds* the Court suggested that the privilege was rooted in the separation of powers.").

<sup>194</sup> See *Reynolds*, 345 U.S. at 6.

<sup>195</sup> See Weaver & Escontrias, *supra* note 2, at 59 ("The decision seems to involve compromise, not principle. It is about the nuts and bolts of judicial action, not the reach of Article II powers."). To buttress their claim that *Reynolds* was not creating constitutional doctrine, Weaver and Escontrias also note *Reynolds*'s scant justification for its holding and the fact that the Justices' private papers hardly mention the case. See *id.* at 57-58.

<sup>196</sup> For a discussion of this passage, see *supra* text accompanying notes 161-64.

<sup>197</sup> *United States v. Nixon*, 418 U.S. 683, 710 (1974).

Note that the passage merely refers to military and state secrets as Article II duties. This is not itself noteworthy. Nowhere does it suggest that the executive's power to withhold from the judiciary these secrets derives from Article II, let alone that Article II mandates a certain amount of judicial deference. In fact, in *Department of the Navy v. Egan*, after praising the executive branch's superior expertise on military and foreign affairs-related matters, the Court expressly de-constitutionalized *Nixon's* dicta: "'As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities.' [citing *Nixon*]. Thus, *unless Congress specifically has provided otherwise*, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."<sup>198</sup> If the *Egan* Court had believed that the Constitution mandates a certain degree of judicial deference, then it would not have suggested that Congress has the authority to alter the deference standard.

*Nixon's* dicta is best read as explaining the contexts in which prudence warrants judicial deference. After stating the standard, the *Nixon* court cited to *Chicago and Southern Air Lines v. Waterman Steamship Corp.* and included the following quotation from that case: "It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."<sup>199</sup> *Chicago and Southern Air Lines* was not just referring to privileged information but also to the combination of the executive branch's regular access to intelligence reports and the "delicate," "complex" and "prophe[tic]" nature of executive-branch decision making.<sup>200</sup> In other words, the *Chicago and Southern Air Lines* court—and thus the *Nixon* court—was concerned that the judiciary might not be qualified, due to differences in institutional competency, to second-guess the executive branch's judgment on national security matters. Neither *Nixon* nor *Chicago and Southern Air Lines*, however, implies that this rationale for judicial deference is constitutionally based.

Although the majority of courts have continued to refer to the privilege as a "common law evidentiary rule,"<sup>201</sup> after *Nixon*, courts increasingly began discussing the state secrets privilege in "separation of

<sup>198</sup> *Dep't of the Navy v. Egan*, 484 U.S. 518, 529–30 (1988) (emphasis added).

<sup>199</sup> *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *see Nixon*, 418 U.S. at 710 (quoting *Chi. & S. Air Lines*, 333 U.S. at 111).

<sup>200</sup> *See id.*

<sup>201</sup> *See, e.g., In re Sealed Case*, 494 F.3d 139, 142 (D.C. Cir. 2007); *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 546 (2d. Cir. 1991); *In re United States*, 872 F.2d 472, 474 (D.C. Cir. 1989); *see also Doe v. Tenet*, 329 F.3d 1135, 1149 (9th Cir. 2003), *rev'd on other grounds*, 544 U.S. 1 (2005); *Trulock v. Lee*, 66 F. App'x 472, 475 (4th Cir. 2003) (*per curiam*); *Kasza v. Browner*, 133 F.3d 1159, 1165 (9th Cir. 1998).

powers themes.”<sup>202</sup> The pinnacle of this trend is the Fourth Circuit’s recent decision in *el-Masri v. United States*.<sup>203</sup> The *el-Masri* court began with the coy observation that the privilege “performs a function of constitutional significance.”<sup>204</sup> The court then turned to *Nixon*, finding support for a constitutionally derived state secrets privilege in the *Nixon* passage discussed above<sup>205</sup> and a second passage two paragraphs after the first:

No case of the Court, however, has extended [the state secrets privilege’s] high degree of deference to a President’s generalized interest in confidentiality. Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet *to the extent this interest relates to the effective discharge of a President’s powers, it is constitutionally based*.<sup>206</sup>

The *el-Masri* court, however, included only the italicized portion of the quote.<sup>207</sup> In context, the heavily qualified passage says no more than this: *if* the lack of an evidentiary privilege would impede the President’s fulfillment of his constitutional duties, then the privilege has constitutional relevance. The *el-Masri* court ends the paragraph that it began with a recognition of the privilege’s “constitutional significance”<sup>208</sup> by concluding that the “state secrets privilege . . . has a firm foundation in the Constitution.”<sup>209</sup> This statement is without precedent.

Firm foundation notwithstanding, the pertinent question is not whether the Constitution mandates that some such privilege exists, but whether it mandates some amount of judicial deference to the executive branch in the exercise of that privilege. Neither *el-Masri* nor *Reynolds* suggests that it does. The strongest support for this contention is in *Nixon*’s utmost deference passage. However, *Department of the Navy v. Egan* expressly states that utmost judicial deference is subject to congressional override, and the *Nixon* court’s reliance on *Chicago and Southern Air Lines*’s rationale for this deference appears to ground deference in an institutional competency rationale.

#### d. *Potential Conflict of Interest*

Basing judicial deference to the executive branch on the executive branch’s superior expertise on national security–related matters presumes that the invoking official’s judgment will always reflect that

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<sup>202</sup> See Chesney, *supra* note 23, at 1270–71.

<sup>203</sup> 479 F.3d 296 (4th Cir. 2007), *cert. denied* 128 S. Ct. 373 (2007).

<sup>204</sup> See *id.* at 303.

<sup>205</sup> See *supra* text accompanying note 164.

<sup>206</sup> *United States v. Nixon*, 418 U.S. 683, 711 (1974) (emphasis added).

<sup>207</sup> See *el-Masri*, 479 F.3d at 303.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 304.

expertise. Even if such a presumption is warranted, it is certainly not without exception. The state secrets privilege is a convenient vehicle through which an executive official can conceal misdeeds,<sup>210</sup> prevent liability,<sup>211</sup> or simply avoid public embarrassment.<sup>212</sup> As Louis Fisher puts it in his book *In the Name of National Security: Unchecked Presidential Power and the Reynolds Case*: “Executive officers might be better qualified to decide technical questions, but their work within an agency and under the control of the White House invites bias and deception when it comes to withholding and characterizing public documents.”<sup>213</sup> Judge Bazelon, dissenting in the pivotal *Halkin I*, most famously stated the problem: “[T]he [state secrets] privilege becomes a shield behind which the government may insulate unlawful behavior from scrutiny and redress by citizens . . . .”<sup>214</sup>

One might find these potential conflicts of interest problematic for two reasons. “First, when agencies violate the constitutional rights of citizens and commit crimes, it is perverse and antithetical to the rule of law that they may avoid judgment in court and exposure of

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<sup>210</sup> See Fuchs, *supra* note 15, at 153 (“A[n] . . . incentive to keep secrets is that national security secrecy ends public inquiry into allegations of misconduct . . . .”); Kadidal, *supra* note 87 (“[F]ive decades of living with [the state secrets privilege] has shown that the privilege is frequently invoked to cover up executive mistakes.”).

<sup>211</sup> The most poignant example is *Reynolds* itself. In a 2000 Freedom of Information Act request, the children of the original plaintiffs discovered that the crash report did not in fact contain any sensitive information. See FISHER, *supra* note 17, 165–211. Although the government may have had multiple incentives to mischaracterize the crash report, William Weaver and Danielle Escontrias suggest that its motive was “a fear of embarrassment and liability for gross negligence in maintenance of the aircraft that crashed.” See Weaver & Escontrias, *supra* note 2, at 59. A 1982 Note in the Yale Law Journal sums up the dilemma quite well: “Courts hesitate to probe executive decisions concerning international affairs because of . . . judicial recognition that the executive has superior skills for making those policy judgments. In conflict with this reluctance is the need for judicial supervision of evidentiary privileges to prevent their use as a shield against liability.” Note, *supra* note 15, at 578–79; see also Fuchs, *supra* note 15, at 153 (arguing that the desire to avoid government liability creates an incentive to invoke the privilege).

<sup>212</sup> Former Solicitor General Erwin Griswold acknowledged that “[i]t quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but with governmental embarrassment of one sort or another.” Erwin N. Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25; see also Askin, *supra* note 15, at 761–62; Gardner, *supra* note 15, at 586–87; Kadidal, *supra* note 87 (arguing that the government invoked the state secrets privilege in *Edmonds* to prevent airing the discharged employee’s embarrassing complaint that the government was sending translators to the Guantanamo Bay detention facilities that did not speak the language they were purportedly translating).

<sup>213</sup> See FISHER, *supra* note 17, at 121; see also Weaver & Pallitto, *supra* note 15, at 101 (“[I]f department heads or the president know that assertion of the privilege is tantamount to conclusive on the judiciary, and that federal judges rarely order documents for inspection, then there is great incentive on the part of the executive branch to misuse the privilege.”).

<sup>214</sup> *Halkin I*, 598 F.2d 1, 13–14 (D.C. Cir. 1978) (Bazelon, J., dissenting from the denial of the petition for rehearing en banc).



these activities to the public by refusing to disclose inculpatory information."<sup>215</sup> The lower courts have rejected the claim that this problem warrants an exception to the state secrets privilege.<sup>216</sup> If courts rationalize the privilege on the ground that an individual's need for the information is counterbalanced by the public's need for security,<sup>217</sup> it makes little sense to create an exception to force the government to account for its own wrongdoing. To do so, by hypothesis, would be at the expense of public safety.

"Second, if the privilege protects the executive and agencies from investigation and judicial power, then the incentive on the part of administrators is to use the privilege to avoid embarrassment, to handicap political enemies, and to prevent criminal investigation of administrative action."<sup>218</sup> At first glance, the rationale for rejecting the first problem seems to apply to the second problem as well. However, the second problem should give one pause for an entirely different reason: like the flea market owner in *Situation C*,<sup>219</sup> the existence of an ulterior motive makes one's judgment less trustworthy.<sup>220</sup> Thus, greater scrutiny might be appropriate not to force the government to account for its wrongdoing but to ensure that there really is a national security threat.

In state secrets privilege cases, reviewing judges surrender some of their adjudicatory power to executive officials because of the latter's superior expertise. Consequently, the executive official is, potentially, both an interested party and a judge. Because the state secrets privilege makes the government's interest irrelevant, this creates a potential conflict of interest. The government, like a reviewing judge with a personal interest in a case, should respond by recusing itself as judge when the conflict is actual and nontrivial.<sup>221</sup> In this context,

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<sup>215</sup> See Weaver & Pallitto, *supra* note 15, at 90.

<sup>216</sup> See *supra* text accompanying notes 67–68.

<sup>217</sup> See *Fitzgerald v. Penthouse Intern.*, 776 F.2d 1236, 1238 n.3 (4th Cir. 1985) ("When the state secrets privilege is validly asserted, the result is unfairness to individual litigants—through the loss of important evidence or dismissal of a case—in order to protect a greater public value.").

<sup>218</sup> See Weaver & Pallitto, *supra* note 15, at 90.

<sup>219</sup> See *supra* p. 1245.

<sup>220</sup> See Fuchs, *supra* note 15, at 156 ("If the government were an ordinary litigant, its past practices might cause a court to consider secrecy claims with some level of skepticism. At the very least, one would expect the courts to be sensitive to red flags raised in individual cases, including cases in which the government allegedly violates fundamental constitutional principles, cases in which the government employs categorical secrecy claims instead of an individualized assessment of the need for secrecy, cases involving allegations of government misconduct, cases in which the government targets minority segments of the population, cases that suggest a denial of informed citizen participation in government, and the like.").

<sup>221</sup> Because the issue is the amount of information the official gives the reviewing judge, recusal can be a matter of degree.

recusal means providing the judge with the information needed to independently assess the privilege claim.

Although courts and commentators have cited deference rationales in addition to the three mentioned,<sup>222</sup> they tend to supplement, rather than replace, those already addressed. Of the three rationales, institutional competency is the one lower courts invoke most frequently and that commentators regard most highly. *Reynolds's* concern about the risk of exposure is a necessary backdrop to any policy of withholding information, but it is not independently sufficient to justify the lower courts' approaches to judicial deference. And although abolishing the privilege altogether might offend the Constitution, no support exists for the claim that the Constitution mandates a particular degree of deference. Institutional competency itself, however, is an uneasy foundation on which to rest a static deference standard. As *Halkin I* illustrates, the rationale is frequently invoked in a particular factual context: when the link between disclosure and harm is not obvious to a judge or layperson.<sup>223</sup> Moreover, many state secrets privilege cases present potential conflicts of interest for the invoking executive official, thereby reducing the respect the official's superior expertise would otherwise demand.

### III

#### A PROPOSED ANALYSIS<sup>224</sup>

The ultimate question is how much information a judge must review before passing on a state secrets privilege claim. To answer this question, one must understand two facets of the privilege: what conditions must be present for the privilege to apply and to what extent a judge should independently assess whether those conditions are met.

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<sup>222</sup> Additional rationales include fear of burdening the court, *see Sterling v. Tenet*, 416 F.3d 338, 344 (4th Cir. 2005) (noting "'the burdens *in camera* review places upon the district courts'" (quoting *United States v. Zolin*, 491 U.S. 554, 571 (1989))), preserving institutional capital, *see Stone*, *supra* note 3, at 1316 ("If [judges] err in rejecting [the executive's] judgments, judges may harm not only the national security but also the long-term credibility of the judiciary itself."), and fear of "graymail": litigant's forcing the government to settle for high sums of money in order to safeguard national security, *see Sterling*, 416 F.3d at 344 (reasoning that courts should be cautious so as to avoid presenting the government with a "Hobson's choice between settling for inflated sums or jeopardizing national security").

<sup>223</sup> *Halkin I*, 598 F.2d 1, 8-9 (D.C. Cir. 1978)

<sup>224</sup> This section describes the state secrets privilege in terms of variables and how the relationships between them should guide a judge's analysis. One consequence of this approach is that the section frequently uses mathematical terms, perhaps creating the false impression that one could quantify these variables in a meaningful way. As a general disclaimer, the proposed analysis is a schematic that one could not likely apply in its literal form.

### A. The Trigger Test

The following proposal arranges *Reynolds's* pieces into a more precise and flexible trigger test.<sup>225</sup> The trigger test is a function of three variables: (1) the magnitude of threatened harm to the public; (2) the likelihood that disclosing the information at issue will result in that harm; and (3) the importance of the information to the case of the party requesting it.

#### 1. *The Public's Interest*<sup>226</sup>

Consistent with *Reynolds*, the proposed trigger test focuses on the public's interest. Instead of relying upon the imprecise "reasonable danger" and "national security" triggers, however, the proposed trigger test measures the public's interest in terms of the likelihood and magnitude of the potential harm. When invoking the state secrets privilege, an executive official must state, in specific terms, the effect that disclosure would have on the public's security *and*, if not the same, the *actual* harm to the public that might result.<sup>227</sup> As discussed above,<sup>228</sup> the government's proffered harm is rarely *actual* harm to the public. Rather, it is usually a proxy event that will, within a certain degree of likelihood, lead to actual public harm. The problem is that substituting such a proxy for actual harm entails an often-ignored probability. The invoking official and judge should recognize *both* the probability that an event will occur and the probability that the event will *actually* harm the public.<sup>229</sup> The product of those two probabilities then tempers the actual magnitude of the *final* harm.<sup>230</sup>

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<sup>225</sup> The *Reynolds* Court attempted to create a new doctrine that appeared to rest firmly on an established foundation. But as William Weaver and Danielle Escontrias put it: "Although the Court established a procedure for assertion of the privilege, that procedure is not informed by larger principles of law. If the Court had plainly acknowledged that it was starting from scratch concerning the privilege it may have exercised more care in how it formulated its use and the role of courts in that process." Weaver & Escontrias, *supra* note 2, at 63. Taking Weaver and Escontrias's cue, this section might best be read as an attempt to rework *Reynolds* from scratch.

<sup>226</sup> To truly estimate the public's interest, the judge must balance the threat of harm against the public's interest in government transparency. Because the benefit flowing from government disclosure is relatively constant, however, it need not be a variable in the analysis.

<sup>227</sup> See *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) ("Simply saying 'military secret,' 'national security' or 'terrorist threat' or invoking an ethereal fear that disclosure will threaten our nation is insufficient to support the privilege.").

<sup>228</sup> See *supra* Part II.B.1.

<sup>229</sup> A judge should presume that the executive official has honestly characterized the contents of all relevant documents. If a judge has reason to doubt the invoking official's honesty, deference is inappropriate.

<sup>230</sup> Of course, in theory there could be only one probability or there could be more than two. For example, an executive official could argue only that disclosing particular information might lead to the poisoning of a city's water system. In that example, the reviewing judge should recognize only one probability. More often, however, the execu-

If, for example, the concern is exposing the Central Intelligence Agency's methods and capabilities, the executive official should explain to the court how disclosing such information would harm the public. If the harm is great but the causal chain is indirect, the risk may be low.<sup>231</sup> In contrast, if the requested document contains information related to building a nuclear weapon, the harm is great and the causal chain quite direct. Accordingly, the latter poses a greater threat to public safety and the state secrets privilege should more readily apply.

## 2. *The Requesting Party's Interest*

The trigger test measures the requesting party's interest by the effect a successful invocation of the privilege would have on the party's case. If the requesting party can still make a *prima facie* case without the requested information,<sup>232</sup> the interest is low and, consequently, a lower risk of harm to the public might nevertheless trigger the privilege. If without the requested information the judge must dismiss the case,<sup>233</sup> either the probability or magnitude of the harm must be greater to trigger the privilege.

This balancing approach still preserves the spirit of the absolute privilege. Past a threshold showing of probability and magnitude of harm to the public, the privilege might apply regardless of the requesting party's showing of need.<sup>234</sup> In that case, this approach's prin-

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tive official will find it convenient to outline steps between disclosure and harm. For example, the official might argue that (a) a hostile organization might discover the disclosed information; (b) the organization might have uncovered related information sometime in the past, thereby putting it in a position to combine the information in a way that would allow it to poison a city's water system; and (c) the organization might then have the means and desire to actually poison the city's water system. In this example, the reviewing judge should recognize three distinct probabilities: disclosure  $\rightarrow$  (a); (a)  $\rightarrow$  (b); and (b)  $\rightarrow$  (c). The product of those three probabilities ought to be the same as the single probability in the first example. However, if the official knows of additional information that might make some of the intermediate inferences more likely, then explaining the intermediate steps in the causal chain might convince the judge that the harm is more likely than the judge would have otherwise estimated.

<sup>231</sup> In this respect, so-called mosaic cases are actually disfavored in the state secrets privilege analysis. One of the hallmarks of the mosaic theory is that information might be combined in unforeseeable ways to cause unforeseeable harm to the public. Therefore, unless the invoking official can show that, though specifically unforeseeable, the harm is generally likely, mosaic cases are low-probability cases. See Weaver & Escontrias, *supra* note 2, at 71 & n.204 ("[T]he mosaic theory leads to bizarre results, often making courts look foolish, with judges simply divesting themselves of oversight responsibility because of frequently fanciful possibilities of damage to the national security. . . . In the author's opinion, innocuous-looking material is usually just that and provides no aid to our enemies.").

<sup>232</sup> See *United States v. Reynolds*, 345 U.S. 1, 11 (1953).

<sup>233</sup> For discussion of the circumstances under which dismissal is appropriate, see *supra* text accompanying notes 112–117.

<sup>234</sup> See *Halkin I*, 598 F.2d 1, 14 (D.C. Cir. 1978) (Bazelon, J., dissenting from the denial of the petition for rehearing en banc) ("Even assuming that, in the extreme case, 'the most

cial break from the courts' current approach is that the trigger test requires a lower likelihood and magnitude of harm when the requesting party's interest is trivial—a result the current approach is not flexible enough to accommodate. The precise weighting of these factors is beyond the scope of this Note.

## B. Judicial Review: The Deference Calculus

A judge's review of a state secrets privilege claim is only different from the executive official's initial analysis if the judge defers, to some extent, to the official's judgment. Deference in this context means that a judge can affirm an executive official's conclusion that the privilege applies after considering only a subset of the information available to the official. The principal rationale for this deference is the belief that the executive branch is better equipped than the judicial branch to apply the trigger test accurately.<sup>235</sup> That rationale alone, however, does not necessarily warrant withholding pertinent information from the reviewing judge. Deference based on institutional competency differences (competence deference) might mean no more than that a judge who, after reviewing all the pertinent information, disagrees with an executive official's judgment, nevertheless affirms that judgment. This result would follow when the margin of disagreement between the executive official and reviewing judge falls within the margin of competence deference.

As an example, consider the flea-market hypothetical described in the Introduction.<sup>236</sup> There, the issue was whether the owner of the flea market correctly priced the bookcase at \$750. Unlike in the state secrets privilege context, you, as the consumer, are free to study the bookcase in as much detail as the owner who priced it. In *Situation A*, the owner was an expert in the area and knew significantly more about the value of such items. Accordingly, the margin of competence deference in that case would be substantial, perhaps \$400.<sup>237</sup> Therefore, if upon careful inspection you decide the value of the bookcase is anywhere between \$350 and \$1150, you should assume the bookcase is priced correctly. If you believe the bookcase is worth only \$300, you should not purchase it because the margin of disagree-

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compelling necessity cannot overcome the claim of privilege . . . ." (quoting *Reynolds*, 345 U.S. at 11)).

<sup>235</sup> See *supra* text accompanying notes 179–80, 199–200.

<sup>236</sup> See *supra* p. 1244.

<sup>237</sup> A good example of a *very* high margin of competence deference is the scene in *Scent of a Woman* in which the Chris O'Donnell character instructs the blind Al Pacino character when to turn their racing Ferrari onto a side street. *Scent of a Woman* (Universal Pictures 1992).

ment (\$450) is outside the margin of competence deference (\$400).<sup>238</sup>

But unlike in the flea market hypothetical, when the relevant information pertains to military and state secrets, disclosing information has its costs, even disclosure to a judge.<sup>239</sup> Accordingly, a reviewing judge should not require *in camera* review when the judge places little value on the withheld information. The value of the withheld information is a function of the margin of competence deference. But the relevant deference here is not simply competence deference. To translate this back into the flea-market hypothetical, the issue in this context is whether you should purchase the bookcase *upon only minimal inspection*. The relevant margin of deference (scrutiny deference) is the difference between the margin of competence deference and the extent to which information available to the owner of the flea market, but not available to you, would have increased your confidence in your estimate of the bookcase's value (information asymmetry error). The mental calculus required to make this determination can be expressed as follows:

$$\begin{aligned} & \textit{Affirm if } M_D < M_S \\ M_D &= \text{Margin of Disagreement} \\ M_S &= (M_C - C) - I \\ M_S &= \text{Margin of Scrutiny Deference} \\ M_C &= \text{Margin of Competence Deference} \\ C &= \text{Potential Conflict of Interest} \\ I &= \text{Information Asymmetry Error} \end{aligned}$$

### 1. *Information Asymmetry Error*

The reviewing judge's first step is to apply the trigger test, *de novo*, in light of the available information. The information available to a judge at this stage comes from two sources. The first source is the government. The government usually provides information in the form of an open affidavit, or classified affidavit or documents that the judge will review *in camera*.<sup>240</sup> The second type of sources include those facts generally known or that may be inferred from the circumstances.<sup>241</sup>

After applying the trigger test, the judge should estimate the margin of information asymmetry error, which is the extent to which information available to the executive official but withheld from the

<sup>238</sup> If you believe the bookcase is worth \$1500 you should purchase it and assume you got a great deal.

<sup>239</sup> See *supra* Part II.B.4.a.

<sup>240</sup> The *in camera* review at this stage involves only information submitted voluntarily to the judiciary. See generally *Halkin I*, 598 F.2d 1, 6–8 (D.C. Cir. 1978) (approving the district court's decision to consider two government affidavits, one public and one private).

<sup>241</sup> See *supra* text accompanying notes 145, 147–51, 156.

judge would have increased the judge's confidence in the test's outcome. If, for example, the executive official voluntarily submitted all the relevant documents for the judge's *in camera* review, the information asymmetry error would be zero. This is true even if the judge has little confidence in the test's outcome for other reasons. On the other extreme, if the judge knows absolutely nothing about the privilege claim, the information asymmetry error is infinite, regardless of the judge's confidence in the invoking official. The more common scenario is that the executive official will explain in *general* terms the content of the requested documents and their threat to public safety, withholding the *specific* information and threat.<sup>242</sup> In such cases, the information asymmetry error is the extent to which the withheld *specifics* would aid the judge's analysis.

## 2. *Margin of Competence Deference and Potential Conflict of Interest*

The reviewing judge's second step is to determine the margin of competence deference and the potential conflict of interest. The margin of competence deference is the degree to which the executive official is in a better position than the judge to evaluate the risk of harm. That margin is then discounted by the requesting party's showing that factors unrelated to public safety may have influenced the official's judgment. A judge should presume that an executive official possesses an expertise advantage over the judge on all national security-related matters. The government and requesting party should have the opportunity to overcome that presumption by showing that in the particular case the institutional differences are greater<sup>243</sup> or less than presumed.

A judge should also presume that the executive official is acting solely in the public's interest and that therefore the official's judgment fully reflects the official's expertise. The requesting party might overcome this presumption by making a *prima facie* case that considerations unrelated to public safety influenced the executive official's

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<sup>242</sup> Unfortunately, it is impossible to know the contents of the government's classified affidavits that judges review *in camera*. One can only assume that the reason the government prefers to submit a classified affidavit over the actual documents is that through the former, one can describe the documents' contents generally without revealing any specific information.

<sup>243</sup> Mosaic cases—in which the relevance of the requested information might only be apparent to an intelligence analyst—might fall into this category. The judge should also be aware, however, that mosaic cases are generally low-probability cases. See *supra* Part II.4.B. In that case, the judge should accord the executive official greater deference, but the trigger test—which serves as both the executive official and judge's benchmark—will be more difficult to satisfy. In the end, mosaic cases' unique characteristics may cancel themselves out.

decision to invoke the privilege.<sup>244</sup> Different motives may have a greater or lesser influence on an official's judgment. Accordingly, a judge may find that the prospect of ordinary liability, public embarrassment, or a high-profile constitutional violation discount the executive official's expertise by different degrees. Finally, the government ought to have the opportunity to rebut the *prima facie* case against it. Ideally, the prospect of greater judicial scrutiny will create an incentive for the government to devise ways of assuaging the court and public's concern that executive officials are invoking the state secrets privilege on pretextual grounds.

### 3. *Margin of Scrutiny Deference*

In the final step, the judge should either affirm or deny the state secrets privilege claim based on the amount of information available and the margin of scrutiny deference. The margin of scrutiny deference is the difference between the margin of competence deference, discounted for the potential conflict of interest, and the information asymmetry error. If, after considering a subset of the relevant information, the judge's own assessment of the trigger conditions is close enough to the trigger test threshold to be within the margin of scrutiny deference ( $M_D < M_S$ ), the judge should find that the privilege applies without reviewing any additional information.

If, on the other hand, after assessing the trigger conditions, the judge's conclusion that the privilege does not apply is outside the margin of scrutiny deference ( $M_D > M_S$ ), the judge should continue to request information until either (1) the judge's assessment falls within the margin of scrutiny deference, in which case the judge should affirm the privilege's application, or (2) after reviewing all of the available information, the judge's conclusion is still outside the margin of scrutiny deference and therefore the judge should deny the privilege's application. A judge should never reject a state secrets privilege claim without reviewing all pertinent information, for one does not defer to someone with whom one disagrees.

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<sup>244</sup> Cf. *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1023 (Fed. Cir. 2003). In *McDonnell Douglas*, the plaintiffs alleged that the government was invoking the state secrets privilege to engage in fraud and deceit. *Id.* The court rejected this argument as a reason to demand disclosure, reasoning that the plaintiffs had not presented any evidence to support their allegations, nor had they cited any case in which the government had misused the privilege. *Id.* *McDonnell Douglas* thus recognizes the issue but errs in how it assigns the burden for proving that the government is improperly invoking the privilege. A requesting party will never be able to make a full case for the pretext allegation when the party does not have access to all the relevant information. In cases such as *McDonnell Douglas*, the court ought to shift the burden onto the government once the requesting party has demonstrated that circumstances create the potential for a conflict of interest.



#### 4. *Application*

Let us return to the flea market. You see a bookcase priced at \$750; do you purchase it? First, you must identify the information asymmetry error. Here, assume you can freely inspect the bookcase but you do learn that the flea market owner, who priced the bookcase, has documents detailing its age and ownership history. When you ask the owner about the bookcase's age and history the owner responds that it is quite old and has had only a small number of homes but that you can't inspect the relevant documents for confidentiality reasons. Although the withheld information—the specifics of the bookcase's history—would aid you in your evaluation of it, its assistance would not be substantial. You estimate the bookcase's value at \$650 but acknowledge that unknowns relating to the bookcase's history could shift that estimate \$50 in either direction. Therefore, the information asymmetry error is \$50.

Next, you must estimate the margin of competence deference you owe the judgment of the flea market owner discounted for any potential conflict of interest that the owner might have. The owner is a well-known expert in the field. You, on the other hand, are a well-informed antique consumer who even subscribes to an antique-related magazine. Therefore, you estimate that the owner's competency advantage is worth a \$200 deference margin. But you also learn that the owner makes a sizable commission on each bookcase sold. Your concern is that although the owner can estimate the bookcase's value more accurately than you, the promise of a commission might lead the owner to price it over its value. You conclude that the commission probably induced the owner to price the bookcase about \$100 over its value. Therefore, the margin of competence deference decreases from \$200 to \$100.

Finally, you must decide whether you should purchase the bookcase. Is \$650 close enough in light of the information made available to you? No. Had you estimated the bookcase's value at \$650 *after* considering all the relevant documents, the margin of scrutiny deference would be \$100 and your estimate would be just inside that margin. But your lack of information created a \$50 information asymmetry error that you must subtract from the \$100 margin of competence deference. The result is that you should not purchase the bookcase unless your margin of disagreement is less than \$50: that the bookcase is worth at least \$700. As is, your personal estimate is \$100 less than the listed price. Therefore, your margin of disagreement is outside the margin of scrutiny deference.

Your response should not be to go home but to demand more information. Analyzing even *some* of the withheld documents might simultaneously increase your personal estimate of the bookcase's

value from \$650 to \$675 and decrease your information asymmetry error from \$50 to \$20. In that case, your margin of scrutiny deference has increased from \$50 to \$80 and your margin of disagreement has decreased from \$100 to \$75. Because the margin of disagreement is now within the margin of scrutiny deference, you should purchase the bookcase.

### CONCLUSION

The state secrets privilege is a controversial doctrine of unknown origin. It pits the executive branch's duty to protect the public against the judiciary's duty to preserve the rule of law. The Supreme Court has not directly addressed the relationship between the executive branch and judiciary in this context. As a result, lower courts have diverged, applying varying degrees of judicial deference based on unclear rationales. Some recent judicial applications of the privilege have raised red flags and led commentators, if not courts, to reexamine the doctrine. While many of these commentators have criticized the courts for not sufficiently overseeing the privilege's application, none have explored exactly why judicial deference is desirable in one context but not in another.

This Note attempts to reconcile the state secrets privilege with an intuitive understanding of deference. It reorganizes the pieces from the *Reynolds* opinion to separate those that properly belong to the initial trigger test from those that are relevant to the judge's review of that test. The Note then outlines a precise and flexible trigger test, derived from *Reynolds*, as well as a general schematic that highlights why some decisions warrant more judicial scrutiny than others. This schematic is useful regardless of how much deference one believes is appropriate on an absolute scale.

Important differences exist between the judiciary and executive branch. Some differences, such as relative expertise, justify giving the executive branch a more substantial adjudicative role in national security-related issues. Other differences, such as the executive branch's far greater potential for conflicts of interest, should caution otherwise. Yet it is precisely where these differences conflict—where civil liberties and national security intersect—that the law provides judges with the least guidance. Whether reviewing a state secrets privilege claim or Freedom of Information Act request, judges should recognize their relative institutional weaknesses and strengths when reviewing the executive branch's national security-related claims.

